Tentative Rulings for August 4, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

13CECG03308 ***First Choice Medical Group, LLC v. Santé Community Physicians IPA Medical Corporation*** **is continued to Wednesday, August 31, 2016, at 3:30 p.m. in Dept. 503.**

16CECG00086 ***Maria Barbosa Avila v. Tos Farms, Inc., et al.*** **is continued to Thursday, August 18, 2016, at 3:30 p.m. in Dept. 402.**

16CECG00211 ***Padron v. City of Parlier*** **is continued to Wednesday, August 10, 2016, at 3:30 p.m. in Dept. 403.**

16CECG00775 ***Rodriguez v. The Neil Jones Food Company et al.*** **all demurrers are continued to Wednesday, August 10, 2016, at 3:30 p.m. in Dept. 402.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20) **Tentative Ruling**

Re: ***Santiago et al. v. Johal et al.***
Case No. 16CECG01025

Hearing Date: **August 4, 2016 (Dept. 402)**

Motion: Ravnir Johal and Chamkaur Johal's Motion for Determination of Good Faith Settlement

Tentative Ruling:

To deny without prejudice.

Explanation:

Under Code Civ. Proc. § 877.6, "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005." (Code Civ. Proc. § 877.6(a)(1).)

"The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counter affidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing." (Code Civ. Proc. § 877.6(b).)

"A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (Code Civ. Proc. § 877.6(c).)

> "[T]he intent and policies underlying section 877.6 require that a number of factors be taken into account including a **rough approximation of plaintiffs' total recovery and the settlor's proportionate liability**, the **amount paid** in settlement, the **allocation** of settlement proceeds among plaintiffs, and a recognition that a **settlor should pay less in settlement** than he would if he were found liable after a trial. Other relevant considerations include the **financial conditions and insurance policy limits** of settling defendants, as well as the **existence of collusion, fraud, or tortious conduct** aimed to injure the interests of nonsettling defendants. [Citation.] Finally, practical considerations obviously require that the evaluation be made on the basis

> of information available at the time of settlement. '[A] defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be.' [Citation.] The party asserting the lack of good faith, who has the burden of proof on that issue (§ 877.6, subd. (d)), should be permitted to demonstrate, if he can, that the settlement is so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute. Such a demonstration would establish that the proposed settlement was not a 'settlement made in good faith' within the terms of section 877.6."

(*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.)

The *Tech-Bilt* factors only need be considered when the application is contested. (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261.)

There apparently was no agreed-to allocation of the settlement proceeds between the plaintiffs. Given their differing relationships to the decedent, the two plaintiffs' potential recovery would likely differ. Settling defendants provide no approximation of plaintiff's total recovery. They provide no approximation of plaintiff's recovery against Chamkaur Johal in the event she were to prevail on the negligent entrustment claim. Simply pointing out that Chamkaur was out of the country at the time of the accident does not clearly negate any negligent entrustment claim. Thus, the court cannot simply consider Chamkaur's potential liability to be limited to $15,000 under Vehicle Code section 17151.

In *Schmid v. Superior Court* (1988) 205 Cal.App.3d 1244, 1246, the court stated that "a settlement of a personal injury lawsuit is in good faith for purposes Code of Civil Procedure sections 877 and 877.6 where a defendant pays the plaintiff the limit of the defendant's insurance policy and has no other assets, even though the amount paid in settlement is far less than the likely amount of a judgment against the defendant were the case to go to trial." While settling defendants settled for the policy limits, Chamkaur provides no information about his assets or financial condition. It is unknown whether he has assets other than the insurance policy.

Due to the failure to provide this information, the motion is denied without prejudice.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 08/03/16 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Modahl v. Kitchin***, Superior Court Case No. 14CECG02566

Hearing Date: **August 4, 2016 (Dept. 402)**

Motion: Defendant's Motion for Summary Judgment / Adjudication

Tentative Ruling:

To deny. (Code Civ. Proc. § 437c.)

Explanation:

This is an action for professional malpractice, in which plaintiff Charlotte Modhal alleges that defendant Bruce Kitchin failed to represent her competently in an action that she had previously filed against Mister C Investment Corp. Plaintiff sought to recover $1.2 million in the underlying action, representing her claimed share of proceeds as a 25% partner in Mister C.

Defendant moves for summary judgment or adjudication on the ground that a judgment against Mister C would have been uncollectible.

Actual loss or damage is an element of each cause of action asserted by plaintiff in this action. "A client suing his attorney for malpractice not only must prove that his claim was valid and would have resulted in a judgment in his favor, but also that said judgment would have been collectable **in some amount**, for therein lies the measure of his damages." (*Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 571-572, emphasis added.) In *Garretson*, the court held that to withstand a JNOV, the "malpractice plaintiff need only prove he could have collected *something* from the defendant in the case-within-a-case, and it is that amount that is the proper measure of his damages in the malpractice action." (*Id.* at pp. 569, 572, emphasis added.)

> Collectibility is not a question only of the solvency of the defendant in an underlying case, such as in bankruptcy, but rather pertains to the defendant's ability to pay a judgment **or some part of it**. Collectibility is not an all or nothing question, but rather concerns the **measure of damages**, which should not exceed the sum that could have been collected.

(*Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court* (2006) 137 Cal.App.4th 579, 591, emphasis added, internal cites omitted.)

Thus, to prevail at trial plaintiff need not prove that she would have been able to collect on the entire $1.2 million judgment sought. She must only prove that she would have been able to collect something, and that amount would be the limit of her damages. But that is not plaintiff's burden with respect to this motion, as it is defendant who is moving for summary judgment or adjudication.

A defendant can move for summary judgment by showing that one or more elements of the cause of action "cannot be established." (Code Civ. Proc. § 437c(p)(2).) Defendant attacks the element of damages, or collectibility. The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "There is no obligation on the opposing party … to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing every element … necessary to sustain a judgment in his favor." (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.)

Applying these principles to this motion, before the burden shifts to plaintiff to raise triable issues of fact, defendant must show that plaintiff could not have collected **anything** from the defendant in the underlying suit. If there was $1 worth of assets that could possibly have been collected, then this motion cannot be granted, because plaintiff could possibly recover that much in this action. Obtaining summary judgment on the ground of uncollectibility would be quite difficult. Defendant would have to unequivocally show that there was not $1 to recover by any means. Defendant has not met that burden.

The court sustains plaintiff's objection numbers 1-4, directed at Mr. Wilkins' statements that he informed Kitchen that Mister C would not have been able to pay the judgment, and that Mister C would simply file bankruptcy because the company could not pay on the judgment. Mister C's attorney fails to show his personal knowledge of the entity's assets, and speculates in claiming that the company would have filed bankruptcy. These assertions are also hearsay. Objection numbers 5-7 are overruled, though the exhibits objected to have no value in establishing the non-existence of any assets that could be used to at least in part satisfy a judgment.

Even if the objections were not sustained, the filing of bankruptcy does not mean that the creditors get nothing. There is no discussion and evaluation of bankruptcy law in the moving papers. Simply asserting that Mister C would file for bankruptcy protection, even if the assertion wasn't speculative, is not sufficient to satisfy defendant's burden as the moving party. Filing for bankruptcy does not necessarily mean creditors get nothing at all, which is what defendant needs to establish to prevail on this motion.

The motion also relies on statements by Mister C's CFO and CPA. The information about the debts and liabilities is all relevant, but there is no clear evidence that there were no assets at all that could be reached. The moving papers cite to CFO Sean Wood's deposition pages 9:13-11:20. Page 9 is not included. (See Defendant's Exh. H.) Regarding Mister C shutting down, Wood said that he couldn't remember exactly when Mister C shut down, but it was sometime after trial with Modahl. (10:18-22.) When asked if there were any assets or monies available to distribute to owners of Mister C when it ceased doing business, Wood responded, "I don't think there was any – I don't think there was any assets left after December of 2013." (10:23-11:2.) This equivocal testimony is insufficient to establish that there were no assets at all after December 2013. The deposition was taken in December 2015, and Wood was testifying as to the extent of Mister C's assets at a time two years earlier. The moving papers do not establish that at the time of Wood's deposition he had undertaken a thorough review of Mister C's assets

at the earlier time such that he could competently testify as to their nature or extent. And the wording of his answers indicates a lack of certainty. It is equivocal, lacking in foundation, and speculative. Coupled with the fact that Wood couldn't clearly say when Mister C went out of business, the follow-up statement is hardly sufficient to establish that there was no money or assets at that time (whenever that was). When asked if, in August 2013, Mister C had "sufficient assets to satisfy any portion of a $1.2 million judgment," Wood responded, "No. Not really." What does "not really" mean? It is equivocal enough to sound like there was something. It is unclear what, exactly, Wood was asserting.

The motion is also supported by a declaration from Mister C's accountant, Paul Quinn. While Mr. Quinn authenticates certain financial records submitted in support of the motion, and shows the existence of liens and negative income, he never expresses an opinion as to the extent or nonexistence of any assets that could be reached for collection purposes. In support of a motion such as this, the court would have expected to see a declaration from a forensic accountant, showing that he or she had reviewed all relevant financial records and deposition testimony, and concluding that Mister C had no assets, and plaintiff could not have collected any portion of a judgment against Mister C.

Lacking clear evidence that plaintiff could have collected nothing, the burden does not shift to plaintiff to raise triable issues of fact. The motion should be denied.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 08/03/16 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***People v. CNL Funding 2000-A, LP***
Superior Court Case No.: 15CECG02646

Hearing Date: August 4, 2016 (**Dept. 402**)

Motion: By George J. Kroculick on behalf of CNL Funding 2000-A, LP, to be admitted pro hac vice

Tentative Ruling:

To deny, without prejudice. Any new hearing date must be obtained pursuant to The Superior Court of Fresno County, Local Rules, rule 2.2.1.

Explanation:

Proof of service must be by mail. (Cal. Rules of Court, rule 9.40(c)(1).)

There is no indication that the applicant paid the required $50 fee to the State Bar of California. (Cal. Rules of Court, rule 9.40(e).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 08/03/16 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Weingaertner v. Imaging Resources, LLC***
Court Case No. 12CECG02355

Hearing Date: **August 4, 2016 (Dept. 402)**

Motion:

Tentative Ruling:

To deny the request for terminating sanctions. To deny the alternate request to compel production, as moot. To award monetary sanctions against Timothy V. Magill, only, in the amount of $5,500.00, to be paid within 20 calendar days of the date of this order, with the time to run from the service of this minute order by the clerk. (Code Civ. Proc., §2030.290, Subd. (c); Code Civ. Proc., §2031.300, Subd. (c).) **Mr. Magill is ordered to be personally present at the hearing on August 4, 2016.**

To issue an Order to Show Cause and set a hearing on the court's own motion for September 1, 2016, ordering plaintiffs' counsel, Timothy V. Magill, to show cause why he should not be disqualified as counsel.

Explanation:

Terminating Sanctions:

Terminating sanctions are not warranted, as this would only serve to punish plaintiff for the behavior of her attorney. Sanctions are supposed to further a legitimate purpose under the Discovery Act, i.e. to compel disclosure so that the party seeking the discovery can prepare their case, and secondarily to compensate the requesting party for the expenses incurred in enforcing discovery. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262; *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796.) Sanctions should not constitute a "windfall" to the requesting party, giving the moving party more than would have been obtained had the discovery been answered. (*Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 305.) Any sanctions imposed must be "suitable and necessary" to allow the propounding party to obtain the information sought, but they are not designed to "impose punishment." (*Id.* at p. 304.) Terminating sanctions in the first instance may be an appropriate sanction if the abuse of the discovery process is particularly egregious. (*R.S. Creative, Inc. v. Creative Cotton, Ltd*. (1999) 75 Cal.App.4th 486, 496—warranted due to forgery and spoliation of evidence.) However, the imposition of terminating sanctions is a drastic consequence, one that should not lightly be imposed, or requested. (*Ruvalcaba v. Government Employees Ins. Co*. (1990) 222 Cal.App.3d 1579, 1581.)

Even though terminating sanctions are not imposed at this time, plaintiff and her counsel are warned that the court finds that Mr. Magill's conduct regarding the discovery in question was particularly egregious, notwithstanding the health issues

outlined in his declaration. Ms. Weingaertner and Mr. Magill should not interpret this decision as meaning such conduct has been excused or that any future similar conduct will not result in terminating sanctions, *even in the first instance*. The court has given plaintiff the benefit of the doubt and assumed she herself did not contribute to the delay in responding to the subject discovery, and that she in fact may have been ignorant about the conduct of her attorney. But since she is presumed to be aware of this motion, the court will not assume such ignorance in the future.

Monetary Sanctions:

Monetary sanctions against Mr. Magill are amply warranted. Defense counsel was sympathetic and accommodating to Mr. Magill's health condition, and attempted to avoid filing this motion. Mr. Magill repeatedly failed to supply promised responses on dates he had agreed to, and numerous times he completely ignored communications from defense counsel, including requests to meet and confer regarding the discovery responses. This delay caused several postponements of plaintiff's deposition, as the parties had agreed that her deposition would be taken before defendants, and defendants quite reasonably insisted on having the discovery responses before the deposition.

When Mr. Magill finally served responses to the Special Interrogatories, Set One ("Special Interrogatories), and the Request for Production of Documents, Set Two ("RFP#2") on March 15, 2016, there was no verification to the Special Interrogatories, and no actual, verified, response to the RFP#2, but merely the delivery of a CD with copies of documents allegedly responsive to it. Mr. Magill's assistant responded to defense counsel's email about this by giving erroneous information (that the verifications had been mailed that day, when they had not been), and by minimizing defense counsel's concern over the document production by stating that the documents on the CD were all their office possessed or had obtained. She then stated that they were in the process of preparing a "formal" response (quote marks in the original) which would indicate this.

The use of the "scare-quotes" around the word *formal* in the assistant's email appears to imply defense counsel was being oppressive in insisting on a written response to the RFP#2 instead of simply accepting the CD with documents that had been provided on the strength of email representations from her that "this is all we have." Other emails from Mr. Magill and his staff similarly implied this. Clearly, a party seeking document discovery has the right to insist on an actual response, and to have the representation that "this is all we have" be from the *party* and *under penalty of perjury*. This is more than a minor technicality. A party to whom a demand for production is directed *must* respond with a statement that either: 1) she will comply with the demand; 2) she lacks the ability to comply; or 3) she objects to the demand. (Code Civ. Proc. § 2031.210.) And serving unverified responses to any discovery demand is tantamount to no response at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.)

When counsel finally were able to meet and confer, Mr. Magill agreed to provide the verifications and written response to the RFP#2 by April 15, 2016. When these were not provided, Mr. Magill's response to defendants' email about them was that his office

had sent the formal response and verification "as of the end of April, 2016." He then further deflected the issue by complaining about defense counsel's alleged failure to comply with providing available dates for defendant's depositions when he had "been asking for dates for months." Defense counsel responded by letter dated May 10, 2016, clearly indicating that no RFP#2 response or verifications to either discovery had been received, despite the statement in Mr. Magill's email, and as for the depositions he reminded Mr. Magill (as he and his staff had been reminded in the past) that the parties had agreed that plaintiff's deposition would precede that of defendants and that her deposition would not take place until her discovery responses were finally served. Counsel asked Mr. Magill to immediately fax the RFP responses and verifications if in fact he had them.

If these documents had actually been in existence at that time, and had been lost in the mail, responding to this would have been a simple matter. And yet, Mr. Magill did not respond to the May 10th letter, or a follow-up email on May 18, 2016, or a follow-up telephone call. He did not provide the required discovery responses until June 15, 2016, after he had received his copy of this motion on or around June 10, 2016. (Note: defendants indicate their motion was filed on June 10, 2016, but even though it might have been served and mailed to the court on that date, the file stamp indicates the motion was not filed until June 17, 2016.)

Sanctions are mandatory unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." (Code Civ. Proc., §§ 2030.290, Subd. (c) and 2031.300, Subd. (c).) While Mr. Magill's declaration attempts to provide such justification, it fails to do so, especially as defense counsel were patient and more than accommodating regarding his health problems. The fact that an attorney has personal problems does not justify his failure to meet his ethical duties to his client and the court. "(E)ven in the face of serious personal problems, an attorney has a professional responsibility to fulfill his duties to his clients or to make appropriate arrangements to protect his clients' interests." (*Smith v. State Bar* (1985) 38 Cal.3d 525, 540.)

Furthermore, his health problems do not excuse erroneous statements of compliance when there has actually been no compliance; they do not excuse outright failure or refusal to respond to email, letter, and telephone communications; they do not excuse minimizing defendants reasonable insistence on requiring a "formal" response to RFP#2; they do not excuse deflecting the issue by attempting to cast defendants as the parties who were failing to cooperate with discovery (especially in light of the accommodations defendants repeatedly provided in the face of plaintiffs' clear failure to cooperate).

Moreover, Mr. Magill's health problems do not excuse several apparently erroneous statements – perhaps deliberate misrepresentations – made within the opposing papers themselves:

- Numerous times Mr. Magill stated that actual verified responses to RFP#2 were served on March 15, 2016. (See Magill Decl., pp. 2:9-10, 2:14-16, 4:1-8.) But he failed to provide any proof of this. The copy of RFP#2 attached to his declaration

was signed by him on May 23, 2016 and was verified by plaintiff on May 20, 2016. Furthermore, Magill's own assistant acknowledged in emails in March that the "formal" response had not been sent in March, and that it was being worked on, and that the verifications had not been sent. And the email records provided by defendants show that when Mr. Magill made a slightly different assertion in his email of May 7, 2016 – that he had sent the formal response and the verifications at the end of *April* – defendants quickly responded that they had not received these and asked him to resend them, if that was true, and Mr. Magill suddenly went silent.

- Mr. Magill states unequivocally at Paragraph 6 of his declaration that he served the Special Interrogatories "with verifications" on March 11, 2016, but provides no proof of this. The Special Interrogatories response attached to his and Mrs. Magill's Declaration is dated by Mr. Magill on June 15, 2016. And, curiously, the *month* on plaintiff's verification – i.e., the crucial piece of information needed to prove his assertion – is overwritten and illegible. Clearly, this fails to prove she originally signed it in March rather than June, when Magill finally served it. It only clouds the issue further. And yet, Mr. Magill went so far as to repeat this unfounded claim *in the formal discovery response* itself: "Plaintiff's attorney has discovered an original verification for these responses [i.e., the one purportedly signed in *March*] that he attaches to this amended response. It is being mailed to defendants immediately upon Plaintiff's attorney realizing that the verification was not included." (Magill Declaration, Ex. 5, p. 2:5-7, brackets added.) If this assertion is untrue, the sanctionable conduct is only compounded by his inclusion of it in the response itself.
- Mr. Magill states at Paragraph 16 (p. 5:9-11) that the CD sent to defendants in March had over 165 pages of documents, but provides no proof of this. Defense counsel states in Reply that the CD only had 23 pages of documents. To be fair, defense counsel also provided no proof of her assertion. However, her statement is supported by a comment made in an email from defense counsel Laura Heyne sent on March 21, 2016: "Given the **extremely limited amount of documents** that Plaintiff has provided to Defendants, formal responses stating that all documents have been provided is necessary." (Emphasis added.) As between the two contentions, and on this record, defense counsel's is the more credible.
- Mr. Magill states several times that he "believed" that the formal response and the verifications had been served, but this assertion is not credible in the face of his continued *promises to provide* this discovery, and his failure to prove that it was sent at any time prior to June 15, 2016, and then only in response to being served notice of this motion.

On this record, monetary sanctions are justified, as this conduct represents a misuse of the discovery process. (Code Civ. Proc. § 2023.010, subd. (d).)

Order to Show Cause:

The facts stated in Mr. Magill's declaration regarding his health raise serious concerns as to whether or not he is able to effectively represent plaintiff at this juncture.

The California Rules of Court, Rule 3-110 states: (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and **physical ability reasonably necessary for the performance of such service**. (Emphasis added.) The California Supreme Court has found that an attorney has a duty to withdraw in such a situation. (*In re Sanders* (1999) 21 Cal.4th 697, 712.)

Mr. Magill's narrative indicates he suffers from several serious health issues, and it is clear these did contribute to the extreme delay in responding to the discovery propounded by defendants, even if the court has found this did not excuse his failure to respond. He declares that these health issues have caused him to close his law office and work out of his home, and to file for bankruptcy.

Also of important consideration, he indicates he currently receives private disability pay, and that he has begun the process to qualify for Social Security Disability, which appears to mean he is attempting to be declared "totally disabled," or at least obtain a ruling of some percentage of disability. In *Erreca v. Western States Life Ins. Co.* (1942) 19 Cal.2d 388 the California Supreme Court stated that "the term 'total disability' does not signify an absolute state of helplessness but means such a disability as renders the insured <u>*unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way*</u>." (*Id.* at p. 396, emphasis added.) Clearly, the fact Mr. Magill is seeking a finding of disability begs the question of his capacity to effectively represent plaintiff.[1]

In *Smith v. Superior Court of Los Angeles County* (1968) 68 Cal. 2d 547, the Court ruled that a trial court possessed an affirmative duty to make an inquiry where there was "objective evidence *of physical incapacity* to proceed with a meaningful defense of his client, such as illness, intoxication, or a nervous breakdown." (*Id*. at 559, emphasis in the original.) Where client abandonment is at issue, it is the Court's equitable powers to regulate its own proceedings that come into play. (See, *e.g.*, Civil Code section 128.) Where the question of whether a breach of the ethical rules requiring withdrawal has occurred is unclear to the Court, "the court ordinarily must make a determination notwithstanding the uncertainty, as delay in making a decision may well prejudice the client." (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 913-914.) The Court is not charged with protecting the public from negligent attorneys, but is affirmatively

[1] The court does not find defendants' Reply argument regarding plaintiff's bankruptcy trustee abandoning this action as having any import on this motion. This has nothing to do with Mr. Magill's "standing to pursue this matter," as they argue. The statute cited (11 U.S.C. § 327) deals with the trustee's employment of, *inter alia*, attorneys, and not "standing." If anything, the trustee's action may have an impact on the payment of his fees, and the source therefor. But the court assumes the abandonment would mean the property (this lawsuit) reverts back to the plaintiff, and she becomes responsible for decisions about prosecuting her claim, and her representation. Defendants provided no authority otherwise.

charged with protecting the public from counsel rendered unable to perform his or her duties to a client due to medical problems.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 08/03/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***Baldwin v. Aon Risk Services Companies, Inc.***
Superior Court Case No.: 14CECG00572

Hearing Date: August 4, 2016 (**Dept. 403**)

Motions: (1) By Plaintiffs/Cross Defendants Peter Baldwin, Nicholas Bellasis, Ralph Busch, Regina Carter, John Day, Gerald Droz, Larry Edde, Steven Edwards, Salvatore Marra, Tomlyn Winn, and Cross Defendant Alliance Insurance Services, Inc. for summary judgment or, in the alternative, summary adjudication on the cross complaint;

(2) By Plaintiffs/Cross Defendants Peter Baldwin, Nicholas Bellasis, Ralph Busch, Regina Carter, John Day, Gerald Droz, Larry Edde, Steven Edwards, Salvatore Marra, Tomlyn Winn, and Cross Defendant Alliance Insurance Services, Inc. to seal

Tentative Ruling:

To deny the motion for summary judgment; to grant the motion to seal, in part, as outlined below, and to deny the remainder of the motion to seal.

For those portions of the records the Court has granted the motion to seal, moving parties are to file new redacted documents that comply with this order in substitution of those already filed. For those portions of the records the Court has denied the motion to seal, moving parties are to proceed pursuant to California Rules of Court, rule 2.551(b)(6), including return of all lodged records that will not be sealed to moving parties unless within 10 days they notify the clerk that the record is to be filed pursuant to California Rules of Court, rule 2.551(b)(6), with moving parties to submit the substituted records which are being sealed pursuant to California Rules of Court, rule 2.551(d). Moving parties should contact management in the civil unlimited department to arrange for the substitution of lodged and return of lodged materials. This includes the materials for which the motion is being denied: exhibits 4-26 to the declaration of Seth Gerber, the separate statement of facts (set forth in three volumes), and the notice of motion and memorandum of points and authorities.

The motion to seal filed by Aon Risk Services Companies, Inc., Aon Risk Insurance Services West, Inc., Aon plc, Aon Group, Inc., and Aon Corporation on July 21, 2016, is taken off calendar, without prejudice to obtaining another hearing date. The Superior Court of Fresno County does not allow "piggybacking" of motions. Local rule requires that prior to the filing of any law and motion matter, a date and time for hearing shall be

reserved with the law and motion clerk. (Fresno County Sup.Ct., Local Rules of Court, rule 2.2.1.)

Explanation:

Motions for summary judgment or, in the alternative, summary adjudication

"[I]n moving for summary judgment, a "defendant ... has met" his "burden of showing that a cause of action has no merit if" he "has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, as modified (July 11, 2001), hereafter "*Agular*.")

The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. If the moving party carries this burden of production, it causes a shift, and the opposing party is then subjected to a burden of production to make a prima facie showing of the existence of material fact. A prima facie showing is one that is sufficient to support the position of the party in question. (*Aguilar* at pp. 850-851.)

Unlike its federal counterpart, "[s]ummary judgment law in this state … continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. … The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar* at pp. 854–855, fn. omitted.) The reason is that the statutory language requires that the motion be "supported" by evidence. (*Ibid.*)

A defendant does not satisfy its burden of proof by producing discovery responses that do not exclude the possibility that plaintiffs may possess or may reasonably obtain evidence sufficient to establish their claim. (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1441-1442.)

Further, a plaintiff's unawareness of facts to support a claim does not necessarily show the claim "cannot be established" where the facts are not likely to have been known to the plaintiff. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749.) For example, where a plaintiff testified at deposition in a civil conspiracy case, he was personally unaware of any significant communication between the defendants, this didn't show his cause of action could not be established because there was no reason to suppose he would have been present to observe such communications. Such evidence was insufficient to shift the burden of proof to plaintiff to prove a triable issue existed as to the conspiracy allegations. (*Ibid.*)

Not only must Cross Defendants show that Aon does not possess, and cannot reasonably obtain, needed evidence, on its claims, Cross Defendants must also set forth all material evidence on point, not just the evidence favorable to them. (*Rio Linda Unified School District v. Superior Court* (1997) 52 Cal.App.4th 732, 740.)

As the party moving for summary judgment, the Cross Defendants have the burden to show entitlement to judgment concerning all theories of liability asserted by plaintiff. (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 717.)

The facts submitted to adjudicate the first cause of action in the second amended cross complaint are: (1) on May 5, 2015, the court sustained the general demurrers to the first cause of action as brought by Aon Risk Services Companies, Inc., Aon Corporation, and Aon plc, as to Baldwin; (2) Aon human resources manager Sara Marzo did not know of any facts indicating there was any effort to preplan the departures on February 25, 2014; (3) Aon human resources advisor Janet Hollcroft was not aware if Baldwin engaged in any wrongful conduct which would, in her view, have breached any of his obligations to Aon; (4) Tom Rodell, vice president of Aon's field operations, who was responsible for California, had no knowledge of any facts indicating Baldwin preplanned his departure with any of the other Individual Cross Defendants or preplanned the solicitation of other Aon employees prior to February 25, 2014; (5) Thomas Branigan, Aon managing director of the surety group, was not aware of any preplanning before the departures on February 25, 2014, by Baldwin to solicit employees to leave Aon and join Alliant or to solicit Aon's clients to join Alliant; (6) Paul Rodriguez, Aon regional managing director for the west region, did not have any specific facts to show that there was a coordination to depart Aon; (7) Art Morgenstein, senior vice president for Aon, reviewed Baldwin's e-mails after his departure and did not come across any e-mails that indicated any pre-planning to solicit clients or employees or that he had solicited or encouraged any other Aon employees to leave Aon and join Alliant; (8) Tom Fitzgerald, chief executive officer at Aon, had not been told that Baldwin solicited other Aon employees to leave and joint Alliant, was not aware of any documents which would show that the individual Cross Defendants were talking about leaving en masse, and did not have any facts or know of anybody that would have any facts to show that the individual Cross Defendants were communicating with each other in advance of the departure; (9) Alliant reached out to the individual Cross Defendants to let each of them know they wanted them to start employment on February 25, 2014; (10) Aon witnesses, including Marzo, Hollcroft, executive vice president managing director Aon CSG George Heekin, executive vice president for Aon Phil Luecht, and CEO of Aon's CSG Kevin White, testified they have no knowledge of any effort by Baldwin to solicit other Aon employees to leave Aon and join Alliant; (11) Branigan wrote an e-mail to Luecht and Rodriguez on February 28, 2014, stating the departures were an "indictment on our senior leadership" and Luecht forwarded the e-mail to his manager at the time, Scott Trethewey, stating that "Tom is spot on, this is not an indictment on CSG but rather the firm as a whole"; (12) no one called Rodriguez to offer him a job at Alliant, he did not witness anyone pick up a phone and receive an invitation to go interview at Alliant, he was not on any phone calls where any invitations were extended to Aon employees, and he did not attend any meetings where anyone stood up or offered invitations to go interview at Alliant; (13) Branigan spoke to employees remaining in the Fresno office and none of them reported that any of the former top executives at

Aon had called them to offer them jobs at Alliant or that there were any meetings where people gathered together and there was a discussion about obtaining employment at Alliant; (14) Aon witnesses, including Catherine Rueter (Gustavson), senior vice president in Aon's Salinas office, Scott Trethewey, executive vice president and chief operating officer of CSG within Aon, and Branigan testified that employees were crying and seemed shocked and surprised by the departures; (15) Aon witnesses, including Ben Wolfe, former west coast regional director at Aon, stated that employees were concerned about their future at Aon after the departures of the individual Cross Defendants and felt they had no choice but to leave and that employees were not assured they would have work or a job if they remained at Aon; (16) Aon witnesses testified they did not know whether Baldwin solicited clients to transfer business prior to termination or that he planned to solicit clients or prepare broker of record letters in advance of his resignation; (17) Aon witnesses Marzo, Hollcroft, Trethewey, Fitzgerald, Heekin, Rodriguez, White, Janice Lum chief operating officer for the west region, Alex Michon senior vice president at Aon, and Ashley Robinson senior account specialist for Aon, all testified that they were not aware of any facts indicating that Baldwin took Aon confidential information or purported trade secrets with him when he left Aon or improperly used Aon confidential information or purported trade secrets after leaving Aon; (18) at 8:19 p.m. on February 25, 2014, the day of the departures, Fitzgerald agreed to "unleash legal" even though he had no evidence beyond the fact that the employees had left and joined Alliant; (19) Christopher Wellin, senior specialist of discovery forensics at Aon at the time of the departures, believed he performed a forensic analysis of computers, laptops, hard drives, or external drive of the former employees, but could not remember which ones, could not remember the specifics of his forensic analysis or findings, and refused to answer on the basis of privilege whether any of the former employees downloaded, copied, transferred, gained unauthorized access, or stole any of Aon's information; (20) Morgenstein reviewed Baldwin's e-mails after his departure and did not come across any e-mails that showed he sent Aon trade secret or confidential information to any third parties; (21) Wolfe testified that he did not know of any information indicating that any individual Cross Defendant took or misused specific contact information concerning clients, did not know of any information indicating any individual Cross Defendant took or misused specific contact information concerning clients; did not know of any information indicating any individual Cross Defendant took or used any business detail information of Aon's, and did not know of any information indicating that any individual Cross Defendant took or misused any coverage information, revenue or financial information, coverage history information, or any other Aon information; Wolfe also did not remember anyone in the company worldwide telling him that there had been a breach of confidentiality or that any individual Cross Defendant stole client information; (22) Aon witnesses were not aware of any facts indicating that Baldwin took Aon computers or other information with him when he left Aon; (23) Aon witnesses, including Ruben Delgado, facilities manager for the Fresno, Salinas, and Walnut Creek Aon offices, were not aware of any systematic effort to inventory Aon equipment or electronic devices after the departures; (24) neither Marzo nor Hollcroft followed Aon's exit protocol concerning the former Aon employees; (25) a photograph of Teddy Henley's office in Aon's Fresno office taken by Trethewey on February 27, 2014, showed that there were laptops and manila envelopes on her table and desk but he did not look in the envelopes; (26) Rodell did not know one way or the other whether any information was unlawfully accessed, taken, or used by

any of the former employees from Salesforce, a tool used to attract clients and sales opportunities, concerning client decision makers; (27) Fitzgerald was not aware of any evidence that a client list was taken or that client data was taken from Bridge, a billing system/agency management system that contains client information, billing information, and carrier information, and did not know anyone who was aware of any such evidence, and had not seen a report or been told that any investigation regarding Bridge or Salesforce had been completed; (28) Wolfe had no personal knowledge of the deletion of any files from Bond Link, a system that contained details on the majority of clients, or any other electronic database of any of the former Aon employees; (29) Rodell testified that there "was so much information, it was difficult to get a sense of, you know, what we had or we didn't have," and that there were "a lot" of file cabinets and that a team of five to 10 people came out to inventory the files in the file cabinets. Rodell did not remember a specific conversation that any particular files were missing; (30) Luecht testified that teams of people came into the office after the departure to put together "thousands" of client files, and testified that there were "a lot of clients and a lot of files"; (31) Aon witnesses testified they were not aware of any missing files; (32) Aon witnesses testified they were not aware if any inventory of hard copy documents had been created; (33) Aon witnesses, including Douglas Turk, former executive vice president, western region managing director for Aon, stated that there were papers "strewn across desks" and there were "papers all over the place" and Wolfe testified he did not recall if he had undertaken any effort to analyze that paperwork or if he had photographed it to preserve it for evidence; (34) Aon witnesses have admitted and photographs evidence that there were bins and shredders filled with shredded material, but no one reviewed the shredded materials or made any effort to preserve the shredded material; (35) Delgado received a letter from building management informing him that they had retained trash bags from the Fresno office, and that it would maintain the trash bags until December 31, 2014, he did not recall if he had responded to the letter or instructed anyone to maintain the contents of the trash bags and did not know where the trash bags were; (36) Rueter had no idea whether the former employees rook papers with them when they left as opposed to putting them in the shred bin that she did not inspect; (37) Wolfe testified it was possible that paper was shredded and not taken; (38) boxes of documents were transferred from Aon's central California offices to other offices, including 20 boxes that were shipped to Los Angeles on or about February 25, 2014, and more than 8 boxes to the Sacramento office; (39) Aon witnesses have admitted that client names are not confidential, that the size of books of business are not confidential, and that employees have the right to share salary information with potential employers; (40) Aon acquired and considers employment agreements, salary information, and client information of potential recruits; (41) Trethewey testified that completing a broker of record, in many instances, does not require any information from the competitor, the form is in most cases, one page, and the client completes information on who the carrier is and the policy number, signs the form, and sends it back, and most are fairly straightforward and completed on the client's timetable; (42) White testified that a client can provide the policy information needed to complete a broker of record form; (43) Aon witnesses confirmed that client contact information is publicly available; (44) Fitzgerald acknowledged that a broker of record form could be completed in one minute; (45) Aon is the only cross complainant licensed to sell insurance in California; and finally, (46) Aon plc is a holding company whose principal assets are the shares of capital stock and indebtedness of our subsidiaries.

The above facts do not show that the breach of fiduciary duty cause of action lacks merit. Nor do the above facts show that the cause of action is preempted by the California Uniform Trade Secrets Act. The evidence relied on here is largely deposition testimony – there are no *written discovery responses* from Aon stating in essence that it has no evidence that it does not possess and cannot obtain evidence to support its claims.

Further, and more to the point here, the deposition testimony involves something that "Aon witnesses" are unlikely to know: the allegedly secret plans behind Cross Defendants' defection to Alliant all on the same day or within a very short period of time purportedly in order to cripple Aon. A plaintiff's unawareness of facts to support a claim does not necessarily show the claim "cannot be established" where the facts are not likely to have been known to the plaintiff. (*Villa v. McFerren, supra,* 35 Cal.App.4th 733, 749.)

Many of the facts are that remaining Aon management spoke to employees in the Fresno office and none of them reported that any of the former top executives at Aon had called them to offer them jobs at Alliant or that there were any meetings where people gathered together and discussed obtaining employment at Alliant. The allegations are that Alliant wanted only Aon's best people. This doesn't mean that no one asked the Cross Defendants and others who did go to Alliant to leave Aon. This doesn't mean that other Aon employees didn't receive telephone calls. This doesn't mean there weren't meetings where people discussed obtaining employment at Alliant. It only means that certain people, who were left behind, didn't know about these alleged incidents. The fact that Aon employees who remained didn't know about the plans is irrelevant because it is unlikely they would have been privy to conversations between Cross Defendants about secret plans to leave Aon and go work for Alliant.

Further, there are no facts in the separate statement that show that any of the deponents has any authority to bind Aon in any way with their statements. In other words, just because certain of Aon employees testified to something doesn't mean that Aon is bound by their statements as being Aon's own statements.

Many of the arguments are that Aon "lacks evidence" to back up its allegations in the second amended cross complaint, but Cross Defendants' motion simply relies on testimony of a few Aon employees to the effect that they didn't know something had happened, or that they themselves didn't do something or weren't "aware" of something. But *Aguilar* makes it clear that the defendant must present evidence that the defendant does not possess, and cannot reasonably obtain, needed evidence, through things such as interrogatories and supplemental interrogatories. (*Aguilar* at pp. 854-855, fn. omitted.)

Nor have moving parties set forth all material evidence on point, concerning conversations and meetings and job offers made to Cross Defendants and/or other Aon employees who left Aon to work for Alliant. (*Rio Linda Unified School District v. Superior Court, supra,* 52 Cal.App.4th 732, 740.)

Moving parties have left a large swath of allegations of the second amended cross complaint unchallenged. (*Lopez v. Superior Court, supra,* 45 Cal.App.4th 705, 717.) The complaint factually alleges many ways in which breaches of fiduciary duty allegedly occurred by Cross Defendants including usurping business opportunities which belonged to Aon and soliciting Aon clients to transfer business to Alliant while Cross Defendants still owed a fiduciary duty to Aon, using Aon's time, facilities, and resources. Cross Defendants have presented no evidence showing that these elements of Aon's claims have no merit.

For example, did Aon employees have meals with Aon clients in Fresno to get them to move to Alliant with them that the Aon employees charged to their expense account with Aon? Was there a dinner in January of 2013 where Cross Defendants Busch, Day, Edde, and Edwards entertained other Aon employees at a hotel in Sacramento in an attempt to get them to move to Alliant? Was there a meeting with several Aon employees for drinks at a hotel bar in Sacramento several months later? (Second amended cross complaint, ¶¶61-64.) Did Arkley's executive assistant, Ginger Keller, seek to meet with Day and his wife in Los Angeles on December 11, 2013? Did Arkley identify other strong brokers, and begin initiating dialogues with them including Day, Edde, Edwards, Bellasis, and Droz. (Second amended cross complaint, ¶¶65-68.) Did Alliant's board of directors approve the "leveraged hire strategy" in the fourth quarter of 2013? Did Alliant present term sheets to Day, Droz, Edwards, and Bellasis in December of 2013? Did Arkley transmit proposed employment agreements to Cross Defendants around this time? (Second amended cross complaint, ¶¶69-71.) Did Alliant's CFO Zimmer hold meetings with many of the individual Cross Defendants in the weeks before the February 25th departure to plan for the raid? Did Alliant have a conference call on the Saturday before the raid to plan the raid? (Second amended cross complaint, ¶¶77-81.) Did Alliant make representations to Nationwide Insurance as to the volume and nature of the business Cross Defendants would steal from Aon? (Second amended cross complaint, ¶¶93-95.) Did Day make agreements with Aon clients waiving all of Aon's commission (approximately $60,000.00) that a client owned on additional premium after the account was audited (a workers' compensation policy) in order to obtain the client's loyalty? (Second amended cross complaint, ¶100.) See also the very specific factual allegations in the second amended cross complaint at paragraphs 65-68, 69-71, 71-76, 77-78, 82-86, 87-90, 93-95.

Without presenting evidence "knocking out" all of Aon's factual allegations, moving parties did not meet their burden to show that the cause of action had no merit. Further, none of the facts implicate any one of Aon's trade secrets, much less show that the cause of action is preempted by the California Uniform Trade Secrets Act.

The second amended cross complaint defines Aon's trade secrets as: the identities of its clients and their key insurance purchase decision makers, compilations of clients and client contacts, Aon's pricing structures, its negotiated commission rates with insurance carriers, management and business plans and strategies, surety bonding rates, the contracts it has with its clients and the terms thereof, as well as Aon clients' policy numbers, policy types, coverage limits, special riders and addenda, buying histories and preferences, future business needs, risk and loss profiles and coverage needs, premium amounts, fee arrangements, renewal information, internal revenues figures and

projections, and the salaries and benefits Aon provides to its employees. (Second amended cross complaint, ¶¶50, 197.)

Concerning the second cause of action directed against Alliant for aiding and abetting the individual Cross Defendants breach of fiduciary duty, the facts submitted concerning this adjudication were: (479) on May 5, 2015, the court sustained the general demurrers to the first cause of action as brought by Aon Risk Services Companies, Inc., Aon Corporation, and Aon plc, as to Baldwin; (480) Aon human resources manager Sara Marzo did not know of any facts indicating there was any effort to preplan the departures on February 25, 2014; (481) Aon human resources advisor Janet Hollcroft was not aware if Baldwin engaged in any wrongful conduct which would, in her view, have breached any of his obligations to Aon; (482) Tom Rodell, vice president of Aon's field operations, who was responsible for California, had no knowledge of any facts indicating Baldwin preplanned his departure with any of the other Individual Cross Defendants or preplanned the solicitation of other Aon employees prior to February 25, 2014; (483) Thomas Branigan, Aon managing director of the surety group, was not aware of any preplanning before the departures on February 25, 2014, by Baldwin to solicit employees to leave Aon and join Alliant or to solicit Aon's clients to join Alliant; (484) Paul Rodriguez, Aon regional managing director for the west region, did not have any specific facts to show that there was a coordination to depart Aon; (485) Art Morgenstein, senior vice president for Aon, reviewed Baldwin's e-mails after his departure and did not come across any e-mails that indicated any pre-planning to solicit clients or employees or that he had solicited or encouraged any other Aon employees to leave Aon and join Alliant; (486) Art Morgenstein, senior vice president for Aon, reviewed Busch's e-mails after his departure and did not come across any e-mails that indicated any preplanning to solicit clients or employees or that he had solicited or encouraged any other Aon employees to leave Aon and join Alliant; (487) Tom Fitzgerald, chief executive officer at Aon, had not been told the individual Cross Defendants solicited other Aon employees to leave and joint Alliant, was not aware of any documents which would show that the individual Cross Defendants were talking about leaving en masse, and did not have any facts or know of anybody that would have any facts to show that the individual Cross Defendants were communicating with each other in advance of the departure; (488) Alliant reached out to the individual Cross Defendants to let each of them know they wanted them to start employment on February 25, 2014; (489) Aon witnesses, including Marzo, Hollcroft, executive vice president managing director Aon CSG George Heekin, executive vice president for Aon Phil Luecht, and CEO of Aon's CSG Kevin White, testified they have no knowledge of any effort by Baldwin to solicit other Aon employees to leave Aon and join Alliant; (490) Branigan wrote an e-mail to Luecht and Rodriguez on February 28, 2014, stating the departures were an "indictment on our senior leadership" and Luecht forwarded the e-mail to his manager at the time, Scott Trethewey, stating that "Tom is spot on, this is not an indictment on CSG but rather the firm as a whole"; (491) no one called Rodriguez to offer him a job at Alliant, he did not witness anyone pick up a phone and receive an invitation to go interview at Alliant, he was not on any phone calls where any invitations were extended to Aon employees, and he did not attend any meetings where anyone stood up or offered invitations to go interview at Alliant; (492) Branigan spoke to employees remaining in the Fresno office and none of them reported that any of the former top executives at Aon had called them to offer them jobs at Alliant or that there

were any meetings where people gathered together and there was a discussion about obtaining employment at Alliant; (493) Michon testified that Busch did not ask him to leave Aon and join Alliant, did not mention Alliant, and did not solicit him to move to Alliant; (494) James Douglas, account executive at Aon, did not leave Aon to join Alliant; (495) Busch left the Aon Salinas office between 8:30 and 9:00 a.m. on February 25, 2014, and was not present at any meeting in the Salinas office on February 25, 2014, did not participate in the meeting by telephone, and did not tell the attendees at the meeting that there was room for everyone at Alliant; (496) Aon witnesses, including Ben Wolfe, former west coast regional director at Aon, stated that employees were concerned about their future at Aon after the departures of the individual Cross Defendants and felt they had no choice but to leave and that employees were not assured they would have work or a job if they remained at Aon; (497) Aon witnesses, including Ben Wolfe, former west coast regional director at Aon, stated that employees were concerned about their future at Aon after the departure of the individual Cross Defendants and felt they had no choice but to leave, and that employees were not assured that they would have work or a job if they remained at Aon; (498) Aon witnesses testified they did not know whether Baldwin solicited clients to transfer business prior to termination or that he planned to solicit clients or prepare broker of record letters in advance of his resignation; (499) Day's long-time client Anderson's premiums were audited at the end of the policy period and it was determined that Anderson owed additional payments to its insurance carrier, Old Republic; at Anderson's request, Day called Old Republic and obtained a waiver of the additional premium to Old Republic; (500) Day did not submit any expense reports for meals or other meetings where he discussed potentially leaving Aon, and did not enter a description of "discussed leaving company" into an expense report; he submitted receipts with handwritten descriptions, and believes that the purported description was the result of an error by whomever transcribed the handwritten notes into the electronic expense report; (501) Aon witnesses Marzo, Hollcroft, Trethewey, Fitzgerald, Heekin, Rodriguez, White, Janice Lum chief operating officer for the west region, Alex Michon senior vice president at Aon, and Ashley Robinson senior account specialist for Aon, all testified that they were not aware of any facts indicating that Baldwin took Aon confidential information or purported trade secrets with him when he left Aon or improperly used Aon confidential information or purported trade secrets after leaving Aon; (502) at 8:19 p.m. on February 25, 2014, the day of the departures, Fitzgerald agreed to "unleash legal" even though he had no evidence beyond the fact that the employees had left and joined Alliant; (503) Christopher Wellin, senior specialist of discovery forensics at Aon at the time of the departures, believed he performed a forensic analysis of computers, laptops, hard drives, or external drive of the former employees, but could not remember which ones, could not remember the specifics of his forensic analysis or findings, and refused to answer on the basis of privilege whether any of the former employees downloaded, copied, transferred, gained unauthorized access, or stole any of Aon's information; (504) Robinson was assigned to client Keenan Farms, for which Droz had been the producer while at Aon; Robinson was able to locate all of the prior years' information for Keenan Farms, including carrier names, lines of insurance, and policy information, and producer and account executive Rita Scott had bound coverage for Aon on the day she departed for Alliant; (505) Robinson was also assigned to client Sakata Seed, for which Droz had been the producer while at Aon; Robinson did not have any trouble locating client information for Sakata Seed following the departures and had no reason to

believe that there was a complete renewal package that had gone missing as opposed to never being generated; (506) Robinson had no basis to believe that any information for Keenan Farms or Sakata Seed was deleted from the Fresno share drive, and did not know whether any information was there in the first place; (507) Turk could not identify any trade secrets or confidential information that Droz took; (508) Turk could not identify any trade secrets or confidential information that Winn took; (510) former Aon employees Danielle Romero and Lisa Edwards were scheduled to host a webinar for a captive healthcare conference prior to the departures, which was cancelled because those individuals transferred to Alliant and Alliant was not prepared for the webinar at that time; Alliant recreated the presentation documents on its own to create new product using information that the client had provided; (511) Morgenstein reviewed Baldwin's e-mails after his departure and did not come across any e-mails that showed he sent Aon trade secret or confidential information to any third parties; (512) Morgenstein reviewed Busch's e-mails after his departure and did not come across any e-mails that showed he sent Aon trade secret or confidential information to any third parties; (513) Carter worked remotely often and Aon was aware of this; (514) Carter did not use any Aon files in her e-mail that remained there from when she worked remotely that clients did not already provide to her separately after she joined Alliant; (515) the e-mails Carter forwarded herself the week before her departure were forwarded because she was on the east coast making presentations on behalf of Aon and needed that information on her iPad for the presentations/meetings; (516) the e-mails Carter forwarded herself just before her departure were so she could work remotely late at night on behalf of Aon; she could not access the attachments from her Blackberry so she forwarded them to her Gmail account so she could open the attachments; (517) Carter did not destroy any paper files, destroy any electronic files, destroy any materials in any form, instruct anyone to destroy any materials, or witness anyone destroying any materials before leaving Aon; (518) Carter did not take any Aon proposals with her at the time of or in anticipation of her departure to Alliant; after she joined Alliant, many of her clients provided her with their files, some of which contained proposals; (519) Luecht did not know if Carter took anything from the office or stole any information; (520) the entire time Marra was working at Aon, he printed documents from his home computer by sending it to her personal AOL e-mail account so he could work from home; Aon never stopped him from doing that; Marra could not print the documents from his Aon laptop because he did not have the proper software to connect his Aon laptop to his printer; (521) Judi Heinle did not remove any rain and hail files from Aon's Fresno office; the files were voluminous, and Aon management was present at her cubicle when she was in the office packing up her personal belongings and when she left the office on the evening of February 25, 2016 [sic]; When Guri Bhangoo from rain and hail called Heinle to ask where the files were located she explained exactly where they were; there would be no reason for her to remove the files because rain and hail maintains all of the files online, and rain and hail gave Heinle access to the 2014 crop year online files for clients after she joined Alliant; (522) Wolfe testified that he did not know of any information indicating that any individual Cross Defendant took or misused specific contact information concerning clients, did not know of any information indicating any individual Cross Defendant took or misused specific contact information concerning clients; did not know of any information indicating any individual Cross Defendant took or used any business detail information of Aon's, and did not know of any information indicating that any individual Cross Defendant took or misused any coverage information, revenue or

financial information, coverage history information, or any other Aon information; Wolfe also did not remember anyone in the company worldwide telling him that there had been a breach of confidentiality or that any individual Cross Defendant stole client information; (523) Aon witnesses were not aware of any facts indicating that Baldwin took Aon computers or other information with him when he left Aon; (524) Aon witnesses, including Ruben Delgado, facilities manager for the Fresno, Salinas, and Walnut Creek Aon offices, were not aware of any systematic effort to inventory Aon equipment or electronic devices after the departures; (525) neither Marzo nor Hollcroft followed Aon's exit protocol concerning the former Aon employees; (526) Turk admitted that Aon had Edde's hard drive and that he learned that fact the day after the departures when it was located in a pile of equipment sitting on a table in Heinle's office; Turk also testified that Lum gave instructions to Marti Lee and Henley to collect all laptops and Blackberries and put them into Henley's office, and that part of Aon's standard procedure is to collect up all computers and secure all computers, including desktops; (527) IT requested that Hollcroft ask Henley to remove the hard drive from Edde's computer on February 25, 2014; (528) either Lum or Hollcroft instructed Heinle to remove Edde and Baldwin's computer hard drives, and she asked Mark Steitz to collect them; he removed them from the computers and left them on a table in her office, each placed in a separate envelope along with their Blackberries, one bearing the name of Edde and the other Baldwin, for identification; Henley showed Branigan where the hard drivers were in her office; (529) Branigan confirmed he went into Henle's office on February 25, 2014 and saw more than 10 computers and "a lot" of envelopes and that Henley showed him where the laptops were located in her office; (530) a photograph of Teddy Henley's office in Aon's Fresno office taken by Trethewey on February 27, 2014, showed that there were laptops and manila envelopes on her table and desk but he did not look in the envelopes; (531) Wolfe referred to the incident with Edde's hard drive as the "hard-drive debacle"; (532) Rodell did not know one way or the other whether any information was unlawfully accessed, taken, or used by any of the former employees from Salesforce, a tool used to attract clients and sales opportunities, concerning client decision makers; (533) Fitzgerald was not aware of any evidence that a client list was taken or that client data was taken from Bridge, a billing system/agency management system that contains client information, billing information, and carrier information, and did not know anyone who was aware of any such evidence, and had not seen a report or been told that any investigation regarding Bridge or Salesforce had been completed; (534) Wolfe had no personal knowledge of the deletion of any files from Bond Link, a system that contained details on the majority of clients, or any other electronic database of any of the former Aon employees; (535) Rodell testified that there "was so much information, it was difficult to get a sense of, you know, what we had or we didn't have," and that there were "a lot" of file cabinets and that a team of five to 10 people came out to inventory the files in the file cabinets. Rodell did not remember a specific conversation that any particular files were missing; (536) Luecht testified that teams of people came into the office after the departure to put together "thousands" of client files, and testified that there were "a lot of clients and a lot of files"; (537) Aon witnesses testified they were not aware of any missing files; (538) Rueter confirmed that the Salinas office had been paperless since 2013 and that she had never inspected the contents of the file cabinets in Busch's office previously; (539) Aon witnesses testified they were not aware if any inventory of hard copy documents had been created; (540) Aon witnesses, including Douglas Turk, former executive vice president, western region managing

director for Aon, stated that there were papers "strewn across desks" and there were "papers all over the place" and Wolfe testified he did not recall if he had undertaken any effort to analyze that paperwork or if he had photographed it to preserve it for evidence; (541) Luecht testified that there were papers everywhere in Bellasis's office; (542) Aon witnesses have admitted and photographs evidence that there were bins and shredders filled with shredded material, but no one reviewed the shredded materials or made any effort to preserve the shredded material; (543) Delgado received a letter from building management informing him that they had retained trash bags from the Fresno office, and that it would maintain the trash bags until December 31, 2014, he did not recall if he had responded to the letter or instructed anyone to maintain the contents of the trash bags and did not know where the trash bags were; (544) Rueter had no idea whether the former employees rook papers with them when they left as opposed to putting them in the shred bin that she did not inspect; (545) Wolfe testified it was possible that paper was shredded and not taken; (546) Trethewey did not know what papers were in Day's office before the departures, did not know if anybody in the office after Day's departure may have removed documents to try to contact clients, and did not know if anyone preserved shredded paper in the bin in Day's office; (547) Turk did not know what had been in hanging folders in Day's office, and did not know if shredded documents in Day's office had been analyzed or disposed of; (548) Branigan did not know what was in the file drawers in Day's office prior to his departure, did not investigate shredded paper in Day's office, and did not know what had happened to the shredded paper, and no fact indicating that Day stole Aon trade secret or confidential information had been shared with Branigan; (549) Day typically did not keep client files in his office because he was generally not involved in the day-to-day insurance business and did not need to work with such files on a regular basis; up until about 6-12 months prior to his departure from Aon, he did keep more personal files in his office, but he moved those files to his home well before his departure from Aon because he was scheduled to retire in September of 2014; he did not remove any Aon files from his office at the time of or in anticipation of his departure; (550) Turk could not identify a single file or a single document that contained a trade secret that Bellasis took; (551) boxes of documents were transferred from Aon's central California offices to other offices, including 20 boxes that were shipped to Los Angeles on or about February 25, 2014, and more than 8 boxes to the Sacramento office; (552) client files were left in Carter's office, which Leucht testified would have been sent to San Francisco or stayed in that office; (553) Aon witnesses have admitted that client names are not confidential, that the size of books of business are not confidential, and that employees have the right to share salary information with potential employers; (554) Aon acquires and considers employment agreements, salary information, and client information of potential recruits; (555) Trethewey testified that completing a broker of record, in many instances, does not require any information from the competitor, the form is in most cases, one page, and the client completes information on who the carrier is and the policy number, signs the form, and sends it back, and most are fairly straightforward and completed on the client's timetable; (556) White testified that a client can provide the policy information needed to complete a broker of record form; (557) Aon witnesses confirmed that client contact information is publicly available; (558) Fitzgerald acknowledged that a broker of record form could be completed in one minute; (559) former Aon employees Lisa Edwards, Mark Steitz, John Gizzo, Gloria Miken, Lori Howard, and Lori Hacineth used flash drives in the court of their normal business at Aon and either left the flash drives at Aon

before departing or returned the flash drives to Aon pursuant to instructions from Alliant; (560) when Peter Arkley spoke to or met anyone from Aon about a potential position with Alliant, it was outside the presence of other Aon employees and he told employees to, while at Aon, perform their duties to the best of their ability and for the sole benefit of Aon, to not forward confidential documents to personal e-mail accounts and to try to not bring information home while still working for Aon, to minimize downloading and printing of documents, to not affirmatively tell other Aon employees to join Alliant, to not take any Aon confidential information, and to not access Aon information after leaving; (561) Alliant established a strict hiring protocol to be used with and followed by all new hires, including having potential recruits acknowledge Alliant's prospective employee departure protocols instructing potential recruits not to misappropriate any trade secret or confidential information of their current or former employer, to continue to serve their current employer's best interests while employed with their current employer, to return all property to their current employer, and if subject to a non-solicitation agreement, not to contact any employee of the current employer for the purpose of soliciting that employee to work for Alliant; (562) Luecht testified that he was not aware of any facts indicating that Alliant aided and abetted any of the individual Cross Defendants in soliciting Aon employees; (563) Aon is the only cross complainant licensed to sell insurance in California; and finally, (564) Aon plc is a holding company whose principal assets are the shares of capital stock and indebtedness of our subsidiaries.

Other than the fact concerning the new hiring protocol (fact #561), the facts presented don't demonstrate that Alliant did not provide substantial assistance or encouragement to the Cross Defendants to breach their tort and contractual duties to Aon. (Judicial Council of Cal. Civ. Jury Instns. (Decl. 2015 rev.) CACI No. 3610.) Other than the mention of two clients whose files one of the remaining employees, Robinson, was able to find, there doesn't seem to be any facts involving trade secret preemption, either.

The same rationale applies to the remaining adjudications sought. The facts do not challenge all the factual allegations of the second amended cross complaint. The facts do not show that Aon does not possess, and cannot reasonably obtain, needed evidence, on its claims. The evidence, mostly in the form of deposition evidence, involves something that "Aon witnesses" are unlikely to know. It does not appear that all material evidence on the various points has been set forth.

The Court notes that although moving parties moved for summary judgment, the seventh cause of action was left unchallenged. The motion for summary judgment is thus denied.

Motion to seal

The motion to seal is granted in part, sealing only the following materials:

Sections 2-3 of exhibits A and B to the declaration of Regina Carter; sections 2-3 of exhibits A and B to the declaration of John Day; section 2 of exhibit A to the declaration of Steve Edwards and only the salary and benefits statements in exhibit B of Steve Edwards' declaration; section 2 of exhibit A to the declaration of Larry Edde and

sections 4-5 of exhibit B to his declaration. These items involve Aon's trade secrets concerning the salaries and benefits Aon provides to its employees. (Second amended cross complaint, ¶¶50, 197.)

The remainder of the motion to seal is denied. Sealing orders must be narrowly tailored. (*McGuan v. Endovascular Tech., Inc.* (2010) 182 Cal.App.4th 974, 988 [qualify control records and complaint handling procedures].)

For the items to be sealed, moving parties are to submit new redacted copies for the old redacted copies for filing in the public file, and submit new lodged materials for the other lodged materials. Moving parties must proceed pursuant to California Rules of Court, rule 2.551(b)(6).

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 08/01/16 .
(Judge's initials) (Date)

Tentative Ruling

(20)

Re: ***Parmelee v. Driveline Retail Merchandising, Inc.***
Case No. 14CECG01131

Hearing Date: August 4, 2016 (Dept. 403)

Motion: Plaintiff's Motion for Final Approval of Class Action Settlement; Motion for Attorneys' Fees

Tentative Ruling:

To continue both motions to September 7, 2016, at 3:30 p.m. in Dept. 403. Plaintiff's counsel shall file additional declarations and evidence as specified below by August 16, 2016.

Explanation:

The class has approved the settlement; the evidence shows there are but two opt-outs, out of 1,261 class members, and no objections. The Court can grant final approval to the settlement. However, the attorneys' fees issues should be resolved first, since it may affect the amount that gets distributed to the class.

California goes by lodestar, although there can be an enhancement for extraordinary work and risk, such as where a case goes up through summary judgment or trial, or on appeal, makes new law, etc. California does not use the percentage of the common fund method for determining fees. (*Dunk v. Ford Motor Company* (1966) 48 Cal.App.3d 1794, 1809-1810.)

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys **in the community** conducting noncontingent litigation of the same type." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133.) Class counsel provides no evidence that the hourly rates sought are commensurate with the rates charged by private attorneys in this community. Rather, the rates sought are quite high. Based on the court's experience and knowledge of the local community, the court approves the following *enhanced* hourly rates to compensate counsel for the quality of the work and the risk of nonpayment in contingency cases as a class: $450 for the partner, $300 for associates, $150 for paralegals, and $50 for case managers.

Records by counsel of the time actually spent on a matter are the starting point for any lodestar determination. (*Horsford v. Board of Trustees* (2005) 132 Cal. App. 4th 359, 394.) Class counsel provided a lengthy declaration in support of the request for attorneys' fees, but provided no billing records for the court to review. Counsel shall provide detailed billing records by way of declaration to be filed as specified in the tentative ruling.

Counsel has not provided any documentation supporting the cost award sought. The billing records to be submitted shall detail all costs incurred. Counsel must also provide documentary proof, such as invoices, of the mediator's fee, travel expenses, and claims administrator fees.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 08/01/16 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Gill v. Fresno Community Hospital and Medical Center***

Case No. 14CECG01472

Hearing Date: August 4, 2016 (Dept. 403)

Motion: By Defendants Pervaiz A. Chaudhry, M.D., Valley Medical Group, and Chaudhry Medical, Inc. demurring to the Second Amended Complaint and moving to strike portions of the same.

Tentative Ruling:

To sustain the demurrer to the First, Sixth and Eighth Causes of Action. To overrule the demurrer as to the Ninth Cause of action.

To grant the motion to strike as to the "malice, oppression, and fraud" allegations in paragraphs 24, 32, 38, 43, 54, 73, 90, 106 and 114. To deny the motion to strike in all other respects.

Plaintiffs shall have ten court days in which to file a Third Amended Complaint. Any new or changed allegations shall be set forth in **boldface** typeset.

Explanation:

Defendants Pervaiz A. Chaudhry, M.D., Valley Medical Group, and Chaudhry Medical, Inc. ("Moving Defendants") have filed a demurrer to the First, Sixth, Eighth and Ninth Causes of Action and a motion to strike portions of the Second Amended Complaint.

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead "ultimate facts." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

A demurrer challenges defects that appear on the face of the complaint or are judicially noticeable. (Code Civ.Proc. §430.30, subd.(a).)

Defendant demurs to the First Cause of Action for "Corporate Negligence" on the grounds that it does not state a cause of action and that it is uncertain. Defendant also demurs to the Sixth Cause of Action for Fraud/Intentional Misrepresentation, the Eighth Cause of Action for Negligent Misrepresentation, and the Ninth Cause of Action for "Aiding and Abetting" on the same grounds, but primarily on the legal grounds that the allegations do not meet the heightened pleading requirements for fraud.

Corporate Negligence

Plaintiffs' claim for "corporate negligence" is based on *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332 (*Elam*). *Elam* established that a hospital owed a duty of care to protect patients from harm at the facilities to the extent that hospitals, or the board in control of the hospitals, reviewed the work of doctors in determining whether to give them admitting privileges. (*Id.* at 342-345.)

The Moving Defendants assert that there are no allegations in the SAC from which there can be derived a duty on the part of Moving Defendants to review the work of other doctors or give them hospital privileges. Moving Defendants base their argument in part on the hospital by-laws; however, they are not the subject of their Request for Judicial Notice, and so the Court will not rely upon them.

Likewise, Plaintiffs base their opposition on citations to the "Medical Directorship Contract" between the "Chaudhry Defendants" and co-defendant Community Regional Medical Center. (Opposition at p. 3.) However, this document is also not the subject of a request for judicial notice and, again, the Court will not consider it. The same ruling goes for transcripts and other documents relied on by one or the other party.

All the Court can do is determine whether, from the face of the complaint, there are facts that shows an "*Elam* duty" that extends to the Moving Defendants. Plaintiff says that Paragraphs 9 and 23 of the SAC reflect that Dr. Chaudhry was acting on behalf of the hospital and that Paragraph 24 clearly sets forth that "Dr. Chaudhry engaged in wrongful conduct in relation to this cause [of] action." (Opp. at p. 7.)

Elam creates a duty on the part of the hospital on the grounds that the hospital reviews the qualifications of otherwise independent doctors who have been admitted to the hospital in question. (*Elam*, *supra*, 132 Cal.App.3d at 342-345.) There is nothing in the SAC that indicates that either Chaudhry himself or the corporations or partnerships associated with him were assigned that duty by the co-defendant hospital.

Since the SAC does not allege that the Moving Defendants had such powers, the demurrer on the grounds that the First Cause of Action does not state a claim against Moving Defendants is sustained with leave to amend.

Moving Defendants make an argument in passing that Plaintiff did not seek leave to amend in order to plead this cause of action. This argument does not appear in the demurrer, and is probably more properly the basis for a motion to strike, since it does not

challenge a defect appearing on the face of the complaint. Because it was not properly noticed in the demurrer or motion to strike, the Court will not consider this issue.

Fraud and Misrepresentation Claims

Moving Defendants assert that the SAC does not sufficiently allege the "how, when, where, to whom, and by what means the representations were tendered." (*Lazar v. Superior Court,* (1996) 12 Cal.4th 631, 645.) Defendants contend that the blanket allegation that Dr. Chaudhry and others represented that they would provide safe medical care without jeopardizing Plaintiff's health and safety, contained in paragraph 93 of the SAC is insufficient.

Plaintiffs point to allegations contained in paragraphs 59-72 of the SAC to indicate that they have made sufficient allegations. However, such allegations are conclusory in nature. For example, paragraph 59 states that "[list of defendants], represented to Plaintiffs that Defendant Pervaiz A. Chaudhry, M.D. was able to provide, and/or would provide, Plaintiff with safe medical care without inappropriately jeopardizing Plaintiff's health and safety." Nowhere, however, is there any specificity about who specifically told Plaintiffs that Dr. Chaudhry would provide such "safe medical care," or when, where or by what means. Likewise, the remaining allegations are similarly conclusory.

As a result, Plaintiffs' misrepresentation claims are not pleaded with the requisite specificity. Therefore, the demurrer as to the Sixth and Eighth Causes of Action is sustained with leave to amend.

Moving Defendants demur to the cause of action for "aiding and abetting" on the grounds that, because it incorporates the fraud cause of action, it should be subject to the heightened standard of pleading. Moving Defendants cite to no case law for this proposition. Furthermore, the cause of action incorporates other claims within it. Therefore the demurrer as to the Ninth Cause of Action is overruled.

Motion to Strike

Moving Defendants move to strike the punitive damages allegations and allegations from the complaint as alleged against them as well as certain allegations related to purported drinking on the part of Mr. Chaudhry.

As pointed out by Moving Defendants, the allegations of "malice, oppression, and fraud" are surplusage in a pleading that does not contain prayers for punitive damages. Therefore, the motion to strike is granted with leave to amend. Note, however, that the Court is not, at this juncture, granting leave to add a punitive damages prayer. Therefore, such allegations need some other relevance to the pleading if they are to be part of complaint. Therefore, the motion to strike such allegations is granted.

Moving Defendants contend the drinking allegations are "irrelevant, as they are not needed for plaintiffs to plead their claims" and constitute improper character evidence. (*See* Evid. Code §1101.) However, such allegations are relevant to whether

co-defendant Fresno Community Regional Center was negligent for retaining Dr. Chaudhry's services despite knowledge of his purported alcohol abuse. Therefore, the motion is denied as to those allegations.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 08/03/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(2)

Tentative Ruling

Re: ***Martinez v. Williams et al.***
Superior Court Case No. 15CECG00641

Hearing Date: August 4, 2016 (Dept. 501)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 08/03/16 .
(Judge's initials) (Date)

Tentative Ruling

Re: ***Toscano et al. v. County of Fresno***
Superior Court Case No. 15CECG00654

Hearing Date: August 4, 2016 (Dept. 501)

Motion: Deem request for admissions, set one, admitted and sanctions

Tentative Ruling:

To grant Defendant's motion that the truth of the matters specified in the request for admission, set one, be deemed admitted as to plaintiff Oscar Toscano unless plaintiff serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240. Code of Civil Procedure §2033.280.

To grant Defendant's motion that the truth of the matters specified in the request for admission, set one, be deemed admitted as to plaintiff Maria Del Rio Maravilla unless plaintiff serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240. Code of Civil Procedure §2033.280.

To grant Defendant's motion for sanctions as to plaintiffs Oscar Toscano and Maria Del Rio Maravilla. Oscar Toscano and Maria Del Rio Maravilla, jointly and severally, are ordered to pay $450 in sanctions to the Stammer, McKnight, Barnum & Bailey, LLC within 30 days after service of this order.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 08/03/16 .
(Judge's initials) (Date

(24) **Tentative Ruling**

Re: ***Flanigan v. Western Milling, LLC***
Court Case No. 16CECG01874

Hearing Date: **August 4, 2016 (Dept. 501)**

Motion: Application of Andrew B. Yaffa to Appear as Counsel *Pro Hac Vice* for Plaintiffs

Tentative Ruling:

To grant.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 08/03/16 .
(Judge's initials) (Date

03

Tentative Ruling

Re: ***Toste v. Gottfried, et al.***
Case No. 15 CE CG 01234

Hearing Date: August 4th, 2016 (Dept. 501)

Motion: Defendants' Motions (1) to Compel Plaintiff to Respond to Supplemental Form Interrogatories, Set One, (2) to Have Matters in Requests for Admissions, Set One, Deemed Admitted, and for Monetary Sanctions, and (3) to Seal Plaintiff's Medical and School Records

Tentative Ruling:

To grant the defendants' motion to compel plaintiff Mea Cole's responses to supplemental form interrogatories, set one. (Code Civ. Proc. § 2030.290, subd. (b).) Plaintiff shall serve verified responses without objections within 10 days of the date of service of this order.

To grant defendants' motion to deem the truth of the matters in the request for admissions, set one, to be admitted. (Code Civ. Proc. § 2033.280, subd. (b).) To grant the request for monetary sanctions against plaintiff's guardian ad litem, Jennifer Toste, in the amount of $560. (Code Civ. Proc. §2033.280, subd. (c).) Plaintiff shall pay sanctions to defense counsel within 30 days of the date of service of this order.

To grant defendants' motion to seal plaintiff Mea Cole's medical records and school records, as they are confidential and shall not be placed in the court's public file.

Explanation:

Plaintiff Mea Cole, through her guardian *ad litem* Jennifer Toste, has failed and refused to respond to the supplemental form interrogatories and request for production of documents served on her in March 25th, 2016. Defendants were unable to obtain responses from plaintiff even after making several attempts to meet and confer with Jennifer Toste. Therefore, plaintiff is subject to an order compelling her to respond to the supplemental form interrogatories. (Code Civ. Proc. § 2030.290, subd. (b).) She has also waived all objections to the interrogatories. (Code Civ. Proc. § 2030.290, subd. (a).) In addition, her failure to respond to the requests for admissions means that she is deemed to have admitted the truth of the matters in the request for admissions. (Code Civ. Proc. § 2033.280, subd. (b).)

Furthermore, plaintiff is subject to mandatory sanctions for her refusal to answer the discovery requests, since there is no evidence that plaintiff's failure to respond was justified. (Code Civ. Proc. §§ 2030.290, subd. (c); 2033.280, subd. (c).) Thus, the court intends to order plaintiff's guardian ad litem, Jennifer Toste, to pay monetary sanctions to defendants in the amount of $560.

Finally, the court intends to grant the motion to seal Mea Cole's medical and school records, as she is a minor and therefore her medical and school records are confidential and should not be placed in the public file. (See Education Code § 49076; Civil Code §§ 56.101; 56.103.)

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 08/03/16 .
(Judge's initials) (Date

(27) **Tentative Ruling**

Re: ***Beal v. Beal Properties, Inc.***
Superior Court Case No. **15CECG00123**

Hearing Date: **August 4, 2016 (Dept. 501)**

Motion: Plaintiff's motion for leave to file a second amended complaint

Tentative Ruling:

To grant. The moving party is granted 10 days leave to file their amended pleadings. The time in which the complaint can be amended will run from service by the clerk of the minute order. The new allegations are to be set in **boldface** type.

Explanation:

The court is allowed broad discretion in permitting the parties to amend their pleadings. (Code of Civil Procedure §§ 473(a)(1), 576.) Essentially, "[i]f the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend . . .." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) Hence, the court must balance both timeliness as well as prejudice to the opposing party, "[a]lthough courts are bound to apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to and including trial (citations) this policy should be applied only "[w]here no prejudice is shown to the adverse party ...." (*Magpali v. Farmers Group, Inc*. (1996) 48 Cal.App.4th 471 at 487, citing and quoting, *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558 at 564.)

Here, in light of the relatively recent discovery of the allegations upon which the proposed amendments are premised, as well as the non-opposition to the request, the motion is granted.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 08/03/16 .
(Judge's initials) (Date

(23)

Tentative Ruling

Re: ***Yolanda Garcia v. United Auto Inc.***
Superior Court Case No. 16CECG01904

Hearing Date: Thursday, August 4, 2016 (**Dept. 501**)

Motion: Petitioners Yolanda Garcia's and Eleazar Garcia's Petition to Compel Arbitration, Petition for Court to Pick Arbitration Forum, and Request for Costs and Fees, and/or Sanctions

Tentative Ruling:

To deny without prejudice Petitioners Yolanda Garcia's and Eleazar Garcia's petition to compel arbitration, petition for court to pick arbitration forum, and request for costs and fees, and/or sanctions.

Explanation:

Petitioners Yolanda Garcia and Eleazar Garcia ("Petitioners") petition the Court for an order compelling Petitioners and Respondents United Auto Inc. dba Auto Shopper and Kings Federal Credit Union ("Respondents") to arbitrate Petitioners' claims with JAMS, for an order compelling Respondents to pay Petitioner's filing fees, and for attorney's fees and costs in the amount of $2,775.40.

However, first, Petitioners have failed to file a proof of service of their petition to compel arbitration. (Cal. Rules of Court, rule 3.1300(c) ["Proof of service of the moving papers must be filed no later than five court days before the time appointed for the hearing."].) While Respondent Kings Federal Credit Union has filed an opposition to Petitioners' petition, Respondent United Auto Inc. dba Auto Shopper has not filed any opposition or other response to Petitioners' petition with the Court. Therefore, Petitioner has failed to establish that Respondent United Auto Inc. dba Auto Shopper was timely and properly served with the petition to compel arbitration.

Second, California Rules of Court, rule 3.1330 provides that: "A petition to compel arbitration … pursuant to Code of Civil Procedure section[] 1281.2 … must state, in addition to other required allegations, the provisions of the written agreement and the paragraph that provides for arbitration. The provisions must be stated verbatim or a copy must be physically or electronically attached to the petition and incorporated by reference." In this case, initially, although Petitioners have attached a copy of the RISC contract that includes the enforceable arbitration agreement to their attorney's declaration in support of their petition, some of the words on the left side of the contract have been cut off and, thus, the arbitration agreement is incomplete. Additionally, while Petitioners have submitted what appears to be a clear and complete copy of the arbitration provisions in the RISC contract as part of their reply, the Court declines to consider this new evidence submitted on reply. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.) Finally, even though Petitioners quote portions of the arbitration

agreement in their petition, they fail to state the entire arbitration agreement verbatim in their petition. Therefore, Petitioners have failed to comply with California Rules of Court, rule 3.1330.

Accordingly, the Court denies without prejudice Petitioners' petition to compel arbitration, petition for court to pick arbitration forum, and request for costs and fees, and/or sanctions.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 08/03/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Crop Production Services, Inc. v. EarthRenew, Inc.***
Court Case No. 09 CECG 02733

Hearing Date: August 4, 2016 (Dept. 501)

Motion: CPS' Motion to Compel Custodian of Records to Appear at Deposition, Provide Further Response, and Produce Records

Tentative Ruling:

To deny.

Explanation:

Timeliness

EarthRenew argues that this motion is untimely. Code of Civil Procedure section 2025.480 provides that of a deponent fails to produce any document the party seeking discovery may move for an order compelling that production. (Code Civ. Proc., § 2025.480, subd. (a).) Such a motion must be made no later than 60 days after the completion of the record of the deposition. (Code Civ. Proc., § 2025.480, subd. (b).) Objections to a deposition notice constitute the "deposition record" for purposes of measuring the 60-day period for a motion to compel. (*Unzipped Apparel, LLC v. Bader* (2007) 156 Cal.App.4th 123, 132-133.)

Here, EarthRenew served its objections to the Deposition Notice on March 7, 2016. Crop Production served its Request for Pretrial Discovery Conference on March 18, 2016. The Court issued its order on the March 18, 2016, Pretrial Conference permitting the filing of a motion to compel on April 4, 2016. That order noted that the time to file a motion would be tolled for "46" days. Accordingly the total number of days in which Crop Production had to bring its motion was 111: 60 from Code of Civil Procedure section 2025.480, subdivision (b) + 46 from the April 4 order (by virtue of Local Rule 2.1.17); + 5 additional days for mailing of the April 4, 2016 order (per Code of Civil Procedure section 1013.) Thus this motion, served, June 27, 2016, 101 days after service of the objections, is timely.

The Court's April 4, 2016 order granted 46 days of tolling appropriately for the 2/19/16 Pretrial Discovery Conference Request it addressed, but was overgenerous for the other two Requests it addressed. Be that as it may, Crop Production has relied on the stated 46 days of tolling in bringing this motion and the Court will not rule this motion is untimely.

Document Production

The Court has read the parties' papers and considered all their arguments, and finds that the document Requests are fatally overbroad. No documents will be ordered produced on this ground.

1. *Request No. 10:*

Request 10 has no time limitations and covers every solicitation of investment capital or debt from EarthRenew's inception to the present day. This is overbroad on its face. When discovery requests are grossly overbroad on their face, and hence do not appear reasonably related to a legitimate discovery need, a reasonable inference can be drawn of an intent to harass and improperly burden. (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431.)

Crop Production contends that it must have discovery to test whether EarthRenew could have built the seven anticipated production plants, and the company's relative financial health to assess the likelihood that it could build the future plants. While this is so, the unlimited scope of this interrogatory is unrealistic. Moreover, it calls for investments and debt completely unrelated to building additional plants. While at one point Crop Production states that because the plants were to be built during the five year term of the Offtake Agreement, "the relevant information necessarily covers this term," this ignores the fact the request greatly exceeds this term.

2. *Request No. 30:*

Overbreadth infects Request No. 30 as well. It is unlimited in time and scope. It is not limited to investments for the purpose of constructing new plants or expanding the business as contemplated for the Offtake Agreement. It encompasses significant numbers of documents which have nothing to do with EarthRenew's claim for damages.

3. *Request No. 31:*

Request 31 likewise fatally suffers from overbreadth. It too is unlimited in time and scope. It is not tied to the construction of new plants contemplated for the Offtake Agreement, or specifically to EarthRenew's claim for damages. For example, it conceivably encompasses credit applications at local office supply stores.

4. *Request No. 28:*

Finally, Request No. 28 is overbroad as well. It is not limited in time or scope and EarthRenew contemplated building additional plants other than those for the Offtake Agreements. (Pocha Decl. Ex. 11 at p. 39; Klein Decl. Ex. 1 § 1.1(e), (j).)

The court does not bear the burden of redrafting discovery. (*Hallendorf v. Superior Court* (1978) 85 Cal. App. 3d 553; *Britt v. Superior Court* (1978) 20 Cal.3d 844, 862-863, fn. 7.) The documents need not be produced.

Production of Custodian of Records

The party noticing the deposition may move for an order compelling discovery from a party deponent who fails to appear and who has not served a valid objection under Code of Civil Procedure section 2025.410, subdivision (a). (Code Civ. Proc., § 2025.450, subd. (a).) Because the stated purpose of the deposition is to authenticate the records (See Memorandum of Points and Authorities at 7:14-15), which will not be produced, there is no reason to compel the production of the Custodian of Records.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 08/03/16 .
(Judge's initials) (Date)

Tentative Ruling

(27)

Re: ***Cordell v. Fresno Heritage Partners***
Court Case No. 14CECG03523

Hearing Date: **August 4, 2016 (Dept. 501)**

Motion: Defendant's motion to disqualify expert witness

Tentative Ruling:

To Deny.

Explanation:

Under *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, although a meeting with a prospective expert to explore possible retention is a sufficient forum for confidential information to be disclosed, the party moving for disqualification must establish the disclosure of actual confidential information. (*Id.* 24 Cal.App.4th at 1083.) In the hour long meeting in *Shadow Traffic* the potential expert was advised (to which the expert acknowledged) that the discussion was confidential. (*Shadow Traffic*, *supra*, 24 Cal.App.4th at 1083.) Also, "the subjects of the discussion as being the factual and legal theories about the case, matters traditionally considered confidential." (*Id*. at 1083 – 1084.)

Here, the defendants support their motion with the declaration of the defense attorney who contacted the subject expert witness as well as the designation of that witness as a testifying witness. According to the declaration, "litigation and trial strategy[ies]" were discussed, however, unlike *Shadow*, there was neither an admonition by counsel nor an acknowledgement by expert that the discussion involved confidential information.

Additionally, of the two conversations stated in the declaration, only the June 14 conversation included a specific point of discussion – the expert's testimony regarding the standard of care. (Dec. of Vincent D'Angelo, ¶ 8.) The standard of care was also designated as a topic of the expert's trial testimony. (see Designation of Exp. Witness.) Thus, under *DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, the designation of the expert as a testifying expert does not prohibit contact by opposing counsel. (*DeLuca*, *supra*, 217 Cal.App.4th at 690.)

In sum, the defendant has not established that confidential information was disclosed during to the expert during the two phone conversations sufficient to raise the presumption that the information was later passed to opposing counsel. Moreover, even if such information had been disclosed, the only specific topic identified in the supporting declaration is the standard of care – the same topic of the expert's prospective testimony. Accordingly, the information would be subject to discovery and thus an insufficient basis for disqualification. (see *Shadow, supra,* 24 Cal.App.4th at 1079;

National Steel Products Co. v. Superior Court (1985) 164 Cal.App.3d 476, 482-484; *Shooker v. Superior Court* (2003) 111 Cal.App.4th 923, 930.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 08/03/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(5)

Tentative Ruling

Re: ***Garcia et al. v. CCS Companies et al.***
Superior Court Case No. 15 CECG 03847

Hearing Date: August 4, 2016 **(Dept. 502)**

Motions: Demurrers to the First Amended Complaint filed by Defendants CCS Companies and Rosenberg

Tentative Ruling:

The "meet and confer" requirement of CCP § 430.41(a) has been met. See Declarations of Birenbaum and Rosenberg.

To grant the requests for judicial notice as stated infra.

To sustain the general demurrers on grounds of litigation privilege and statute of limitations with leave to amend.

To overrule the general demurrers on grounds of res judicata and collateral estoppel without prejudice to the filing of a motion for summary judgment.

An amended complaint in strict conformity with the ruling is to be filed within 20 days of notice of the ruling. Notice runs from the date that the Minute Order is mailed by the Clerk plus 5 days for service via mail. See CCP § 1013(a). Plaintiffs are cautioned that they are running out of chances to properly plead a cause of action. In addition, both Plaintiffs must sign the pleading. They are both self-represented. [CCP § 128.7]

Explanation:

Request for Judicial Notice

CCS requests judicial notice pursuant to Evidence Code §§ 452(d) and (h) of:

1. The first amended complaint in Efrain Garcia and Ofelia Garcia v. Allstate Insurance Company, United States District Court, Eastern District of California case no. 1:12-CV-00609—AWI—SKO, filed on May 8, 2013 and the **allegations contained therein**.
2. The April 7, 2015 order on defendant's Rule 52 motion, in Efrain Garcia and Ofelia Garcia v. Allstate Insurance Company, United States District Court, Eastern District of California case no. 1:12—CV—00609-AWI—SKO.

3. The April 7, 2015 judgment in Allstate's favor in Efrain Garcia and Ofelia Garcia v. Allstate Insurance Company, United States District Court, Eastern District of California case no. 1:12-CV-00609-AWI-SKO.
4. The anti-SLAPP motion that Allstate Insurance Company served on June 21, 2012, in Garcia v. Allstate Insurance Company, United States District Court, Eastern District of California Case No. 1:12—CV—00609—AWI—SKO.

Rosenberg requests judicial notice pursuant to Evidence Code §§ 452(d) and (h) of:

1. Lawsuit entitled Allstate Insurance Company v. Efrain Garcia, an individual; OFELIA GARCIA, an individual, et al., filed in the Tulare Superior Court on October 10, 2004 and bearing Case Number PCL104534 (hereinafter referred to as the "underlying lawsuit");
2. July 15, 2008 Motion to' Set Aside Judgment filed by Plaintiffs in the underlying lawsuit;
3. September 12, 2008 General Denial Answers filed by Plaintiffs in the underlying lawsuit;
4. November 14, 2011 Dismissal of the underlying lawsuit filed by moving party herein;
5. May 8, 2013 First Amended Complaint filed by Plaintiffs, herein in the Eastern District of California, bearing Case Number 1:12—CV—OO609-AWI—SKO (hereinafter referred to as the "Federal lawsuit");
6. April 7, 2015 Rule 52(c) judgment entered in the Federal lawsuit against Plaintiffs herein.

Except for the final judgment in *Efrain Garcia and Ofelia Garcia v. Allstate Insurance Company,* United States District Court, Eastern District of California case no. 1:12-CV-00609-AWI-SKO, the requests will be granted pursuant to Evidence Code § 452(d) only; i.e., that these documents (except for the final judgment) were filed in the United States District Court for the Eastern District of California in Case No. 1:12—CV—00609—AWI—SKO and Tulare Superior Court in Case Number PCL104534. But, the contents of those documents are not "indisputably true." [*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 113; *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482-484; see *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 659-660.

The court may take notice of the *existence* of findings of fact made in the other action, but may *not* accept them as *true* on issues in dispute in the present case. I.e., the other court's findings are *not* indisputably true. Otherwise, the judge in the other case would be made "infallible" on all matters, usurping the doctrines of res judicata and collateral estoppel (which are limited to final *judgments*). [*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565; see *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749; *Kilroy v. State of Calif.* (2004) 119 Cal.App.4th 140, 145-148]

As for the final judgment in the federal action, judicial notice will be granted pursuant to Evidence Code §§ 452(d) and (h). A trial court may take notice of the prior judgment in deciding whether to sustain a demurrer based upon res judicata. [*Flores v. Arroyo* (1961) 56 Cal.2d 492, 496.]

Principles of Demurrer

A demurrer can be utilized where the complaint itself is incomplete or *discloses some defense* that would bar recovery (e.g., dates pleaded in complaint show statute of limitations has run). [*Guardian North Bay, Inc. v. Sup.Ct. (Myers)* (2001) 94 Cal.App.4th 963, 971-972; *Estate of Moss* (2012) 204 CA4th 521, 535; *Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1250]

"Face of the complaint" includes matters shown in *exhibits* attached to the complaint and incorporated by reference; or in a *superseded complaint* in the same action. [*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94; *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505—"we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits"; *George v. Automobile Club of Southern Calif.* (2011) 201 Cal.App.4th 1112, 1130—"trial court was not required to credit plaintiff's allegations that extrinsic evidence 'renders the insurance contract at issue here ambiguous'" where language of policy attached to complaint showed otherwise]

Litigation Privilege

The CC § 47(b) "litigation privilege" provides *absolute immunity* for "publications" or "broadcasts" made in the course of a "judicial (or quasi-judicial) proceeding." [CC § 47(b)] Its underlying purpose is to (a) afford litigants and witnesses the "utmost freedom of access" to courts without fear of "being harassed subsequently by derivative tort actions," (b) promote the effectiveness of judicial proceedings by encouraging "open channels of communication and the presentation of evidence," (c) encourage attorneys to "zealously protect" their clients' interests, and (d) enhance the finality of judgments and avoid "an unending roundelay of litigation." [*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213-214; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 321-325. The privilege is broadly worded and doubts are resolved in its favor. [*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 283; *Wang v. Heck* (2012) 203 Cal.App.4th 677, 684]

The litigation privilege was originally designed to shield litigants, their attorneys and witnesses from liability for defamation. [See *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 C3d 1157, 1163, 232 CR 567, 571] However, the privilege has since been interpreted to apply to virtually **all tort actions** *except malicious prosecution*, see infra. Section 47(b) thus provides a defense to intentional infliction of emotional distress, fraud, invasion of privacy, false imprisonment, abuse of process, intentional interference with contract or prospective economic advantage, unfair competition (Bus. & Prof.C. § 17000 et seq.), negligence and even deprivation of civil rights. [See *Silberg v. Anderson* (1990) 50 Cal.3d 205, 215-216 (collecting cases); *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955-956; *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1194 & fn. 3; see also *Heller v. Norcal Mut. Ins. Co.* (1994) 8 Cal.4th 30, 45]

But CC § 47(b) provides no liability shield against malicious prosecution: Statements made in the course of a judicial proceeding are admissible to show the action was maliciously prosecuted (litigants may not institute suit without probable cause for the purpose of obtaining a privilege to harass or defame others). [*Ribas v.*

Clark (1985) 38 C3d 355, 364; *Action Apt. Ass'n, Inc. v. City of Santa Monica* (2007) 41 C4th 1232, 1242; see *Kenne v. Stennis* (2014) 230 CA4th 953, 965]

In the case at bench, the First Amended Complaint is very poorly pleaded. Although it purports to allege three causes of action for "deceit", "fraud", and negligence, none of the elements are pleaded. The tort of deceit or fraud requires: "'(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974, internal quotation marks omitted; see also *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1108.)

Yet, the allegations appear to sound as "malicious prosecution." The use of the phrase "continued to seek money" is simply a substitute for "continued to litigate." In other words, the Defendants sought money from the Plaintiffs through the use of a subrogation action. See pages 4-6 of the First Amended Complaint.

On the one hand, if the Plaintiffs intend to allege fraud-based causes of action, then the litigation privilege applies and the action is barred. See *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955-956. On the other hand, if the allegations are treated to state a malicious prosecution action, then the litigation privilege does not apply. [*Kenne v. Stennis, supra,* 230 CA4th at 965] Therefore, the general demurrers brought on this ground will be sustained with leave to amend.

Statute of Limitations

Where the dates alleged in the complaint show the action is barred by the statute of limitations, a general demurrer lies. (It is not ground for special demurrer.) [See *Saliter v. Pierce Bros. Mortuaries* (1978) 81 Cal.App.3d 292, 300, fn. 2; *Iverson, Yoakum, Papiano & Hatch v. Berwald*, supra, 76 Cal.App.4th at 995; *Vaca v. Wachovia Mortg. Corp.* (2011) 198 Cal.App.4th 737, 746] The demurrer lies **only** where the dates in question are shown on the face of the complaint. If they are not, there is no ground for general or special demurrer (dates not being essential to the cause of action). [See *Union Carbide Corp. v. Sup.Ct. (Villmar Dental Labs, Inc.)* (1984) 36 Cal.3d 15, 25; *United Western Med. Ctrs. v. Sup.Ct. (Michelle Marie H.)* (1996) 42 Cal.App.4th 500, 505] The running of the statute must appear "clearly and affirmatively" from the face of the complaint. It is not enough that the complaint *might* be time-barred. [*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325; *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 321]

In the case at bench, CCP § 338(d) does not apply given the determination that the cause of action alleged is not fraud but malicious prosecution. As for CCP § 335.1, it is the 2-year "personal injury" statute of limitations. It has been determined that malicious prosecution is the infringement of a *personal right* (to be free from abusive litigation) and therefore is subject to the 2-year "personal injury" statute of limitations. [CCP § 335.1; *Stavropoulos v. Sup.Ct. (Stavropoulos)* (2006) 141 Cal.App.4th 190, 197; *White v. Lieberman* (2002) 103 CA4th 210, 216; *Gibbs v. Haight, Dickson, Brown & Bonesteel* (1986)

183 Cal.App.3d 716, 719] [Note: There is a split of authority as to whether CCP § 335.1 or CCP § 340.6 applies when a plaintiff is suing the attorney of the party who instituted the proceedings said to be malicious prosecution. However, given that neither Defendant raised this issue, it will not be addressed.

As for when the action for malicious prosecution accrued, Defendant Rosenberg did not bother to research this issue. Where plaintiff (defendant in the underlying action) prevailed at the trial court level in the underlying action, the malicious prosecution cause of action accrues upon *entry of judgment*. [*Gibbs v. Haight, Dickson, Brown & Bonesteel* (1986) 183 Cal.App.3d 716, 719] Given that the Tulare action was dismissed, the cause of action accrued on that date--November 14, 2011. But, the Garcias timely filed suit in Tulare County for malicious prosecution on March 12, 2012 against Allstate. Then, this suit was transferred to federal court. Judgment was entered on April 7, 2015.

Both CCS and Rosenberg may argue that the statute ran on November 14, 2013—over two years and one month before this action was filed. However, this ignores the allegations that the Garcias only learned of the involvement of CCS and Rosenberg when they received discovery in the federal action. See pages 4-6 of the First Amended Complaint. Contrary to Rosenberg's claim that these allegations render the First Amended Complaint a "sham," a plaintiff is entitled to "plead around" the statute of limitations. [*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1324]

Where plaintiff relies on the "discovery rule" to avoid a statute of limitations defense (i.e., negligent cause of injury not discovered until after the statutory period), the complaint must specifically plead facts that show (i) the time and manner of discovery, and (ii) plaintiff's inability to have made an earlier discovery despite reasonable diligence. [*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808; *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174-175] The burden is on the plaintiffs however to establish, not only the late discovery, but also their inability to discover the relevant facts earlier. [Id. at 177-178]

In the case at bench, Plaintiffs have pleaded the time and manner of discovery. See pages 4-6 of the First Amended Complaint. However, Plaintiffs have not pleaded facts showing an inability to have made this discovery earlier with reasonable diligence. [*Fox v. Ethicon Endo-Surgery, Inc., supra* at 808. Therefore, the general demurrers on statute of limitations grounds will be sustained with leave to amend.

Res Judicata and Collateral Estoppel

The essence of the defense of res judicata is that the same parties may not litigate a second suit on the same cause of action. [*Garcia v. Borelli* (1982) 129 Cal.App.3d 24, 31]. As a general rule, a final valid judgment on the merits in favor of or against a litigant is a complete bar to further litigation on the same cause of action or defense between or among the same parties. [*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795] Res judicata is now frequently called claim preclusion, arising when a second suit involves "(1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." [*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824].

When the subsequent action is on the same cause of action, the prior judgment is a complete bar, but there is no complete bar when the subsequent action is on another cause of action. In such a case, the former judgment is conclusive as to those issues of fact and mixed fact and law actually litigated between the parties. [*Winn v. Board of Pension Comm'rs* (1983) 149 Cal.App.3d 532, 536–37] As one court has explained:

> Collateral estoppel is a distinct aspect of res judicata. It involves a second action between the same parties on a different cause of action. The first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action.

Preciado v. County of Ventura (1982) 143 Cal.App.3d 783, 786 n.2.

A general demurrer may lie where the facts alleged in the complaint or matters judicially noticed show that plaintiff is seeking relief from the same defendant on the same cause of action as in a prior action, or is asserting an issue decided against plaintiff in the prior action. [*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 792—plaintiff's wrongful death action barred by her prior voluntary dismissal of loss of consortium action against same defendant; *Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 Cal.App.4th 547, 556—complaint barred by collateral estoppel; *Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1270-1271--action barred by collateral estoppel subject to demurrer even if issue wrongly decided in first action]

In the instant case, both Defendants have generally demurred on res judicata and/or collateral estoppel grounds. Notably, both Defendants "lump the two doctrines together." But, they are not identical. See *Preciado v. County of Ventura, supra*. As for the res judicata claim, the Plaintiffs sued Allstate Insurance Company in Tulare County and this action was moved to federal court. The parties are not the same. Therefore, on its face, the doctrine of res judicata does not apply to either Defendant. See *DKN Holdings, LLC*, supra.

CCS claims that the federal court found that it was in privity with Allstate. CCS is mentioned in the "findings of fact." But, nothing therein uses the word "privity." Instead, the order states:

> Defendant turned the claim over to CCS, a company that handles subrogation claims for Defendant. *See* Defendant's Ex. 108.
>
> CCS was responsible for pursuing subrogation claims referred to it by Defendant, but was not obligated to report all progress in the suit to Defendant. *See* Plaintiff's Ex. 7.
>
> CCS retained an attorney, Gary Rosenberg ("Rosenberg"), in October 2003, and Rosenberg unsuccessfully attempted to contact Plaintiffs. *See* Defendant's Ex. 109.

> In October 2004, CCS initiated a lawsuit in the Tulare County Superior Court ("the Tulare Action") against the Plaintiffs on behalf of Defendant. *See* Defendant's Ex. 114.

Garcia v. Allstate Ins. (E.D. Cal., Apr. 7, 2015, No. 1:12-CV-609 AWI SKO) 2015 WL 1540929, at *2

As for Defendant Rosenberg, a recent case holds that the existence of an attorney-client relationship does not establish privity between the attorney and the client for collateral estoppel purposes. The attorney is not the party and does not share the party's legal rights and interests. "Although an attorney may control the litigation to a significant degree, the attorney does so on behalf of the client rather than in service of the attorney's own interests." (*Kerner v. Superior Court* (2012) 206 C.A.4th 84, 126 [husband could not use finding in earlier family law proceeding that he did not commit domestic violence as collateral estoppel in his later action against law firm that terminated his employment, despite attorney-client relationship between members of firm and wife in family law proceeding].)

Therefore, the general demurrers brought on grounds of res judicata and/or collateral estoppel will be overruled without prejudice to reasserting via a motion for summary judgment. At present, the statements in the Declarations of Birenbaum and Rosenberg regarding their roles and the roles of their employers in the litigation (except as to the "meet and confer" requirement) cannot be accepted in ruling on the demurrers. They are extrinsic evidence. [*Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881—error for court to consider facts asserted in memorandum supporting demurrer; *Afuso v. United States Fid. & Guar. Co., Inc.* (1985) 169 Cal.App.3d 859, 862, 215 CR 490, 492 (disapproved on other grounds in *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287)—error for court to consider contents of release which was not part of any court record] As for judicial notice, only final judgments can be accepted for the "truth" of their findings. [*Kilroy v. State of Calif.* (2004) 119 Cal.App.4th 140, 145-148]

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 08/03/16 .
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Arnoldo Lua v. H/S Development Company, LLC***
Superior Court Case No. 14CECG02057

Hearing Date: Thursday, August 4, 2016 (**Dept. 502**)

Motion: The Travelers Indemnity Company of Connecticut's Motion to Intervene

Tentative Ruling:

To grant The Travelers Indemnity Company of Connecticut's motion to intervene. (Code Civ. Proc., § 387.)

To grant The Travelers Indemnity Company of Connecticut 15 days, running from service of the minute order by the clerk, to file and serve its complaint in intervention.

Explanation:

The Travelers Indemnity Company of Connecticut ("Travelers") moves this Court for leave to intervene in the instant action pursuant to Code of Civil Procedure section 387.

Code of Civil Procedure section 387, subdivision (a) provides, in relevant part, that: "Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." Further, Code of Civil Procedure section 387, subdivision (b) provides that "if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties, the court shall, upon timely application, permit that person to intervene." "Pursuant to section 387 the trial court has discretion to permit a nonparty to intervene where the following factors are met: (1) the proper procedures have been followed; (2) the nonparty has a direct and immediate interest in the action; (3) the intervention will not enlarge the issues in the litigation; and (4) the reasons for the intervention outweigh any opposition by the parties presently in the action." (*Reliance Ins. Co. v. Superior Court,* (2000) 84 Cal.App.4th 383, 386.)

First, the Court determines that Travelers has followed the proper procedures to intervene in the instant action. Second, since Travelers has established that it has been providing H/S Development Company, LLC and Mendota Investment Company LTD, L.P. with a defense to the construction defect complaint under a reservation of rights and that H/S Development Company, LLC and Mendota Investment Company LTD, L.P. have filed a cross-complaint that seeks, in part, to determine whether or not other

subcontractors have breached a duty to defend H/S Development Company, LLC and Mendota Investment Company LTD, L.P. against the claims raised in the construction defect complaint, the Court finds that Travelers has established that it has a direct and immediate interest in the instant action. (Declaration of Joey Celis, ¶¶ 3-6.) Third, the Court determines that allowing Travelers to intervene will not enlarge the issues in the litigation. Fourth, since no party has filed an opposition to this motion, the Court concludes that the reasons for the intervention outweigh any possible opposition.

Accordingly, the Court grants The Travelers Indemnity Company of Connecticut's motion to intervene.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 08/02/16 .
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Kathy Reyburn v. Santé Health System, Inc.***
Superior Court Case No. 14CECG01868

Hearing Date: August 4, 2016 (Dept. 502)

Motion: Plaintiff's motion to tax Defendant Rea's costs

Tentative Ruling:

To grant the motion to tax costs in part and deny in part. The sum of $5,146.67 is taxed, and costs of $560 are awarded.

Explanation:

A party's right to recover costs is governed entirely by statute, and a prevailing party is entitled as a matter of right to recover his or her allowable costs. (Code Civ. Proc. §1032(b); *Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 241.) The term "prevailing party" includes "a defendant in whose favor a dismissal is entered." (Code Civ. Proc. §1032 (a)(4); *Charton v. Harkey* (2016) 247 Cal.App.4th 730, 738.) Costs awarded to a prevailing party must be (1) incurred by that party; (2) reasonably necessary to the conduct of the litigation; and (3) reasonable in amount. (Code Civ. Proc. §1033.5(c)(1)-(3); *El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc*. (2007) 150 Cal.App.4th 612, 616.) Costs which are "merely convenient or beneficial to" preparation for litigation are not allowed. (Code Civ. Proc. §1033.5(c)(2); *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 129; *Ladas v. California State Auto. Assn*. (1993) 19 Cal.App.4th 761, 773.) Thus, the court may disallow costs that are allowable as a matter of right if they were not "reasonably necessary," and reduce any cost item to the amount the court considers reasonable. (See *Perko's Enterprises, Inc.*, supra, 4 Cal.App.4th at p. 245 [intent of §1033.5(c)(2) is to authorize trial court to disallow costs, including filing fees, when it determines such were incurred unnecessarily]; *Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1201 [trial court may disallow items it determines unnecessary or unreasonable].) Messenger fees may be disallowed in light of other available methods of delivery, such as mail, Federal Express, or personal filing. (*Nelson*, supra, 72 Cal.App.4th at p. 132.) Failure of the party claiming messenger costs to show the necessity or reasonableness of same will result in the costs being disallowed. (*Ibid*.)

Where a prevailing party incurs costs jointly with one or more parties who remain in pending litigation, the prevailing party may recover only those costs actually incurred by him or her, or on his or her behalf in prosecuting or defending the action. (*Fennessy v. Deleuw-Cather Corp*. (1990) 218 Cal. App. 3d 1192, 1196.)

In the case at bench, Plaintiff seeks to tax Defendant Rea's costs on the grounds that some of the costs sought are impermissible, and that none of the costs were incurred solely on behalf of Defendant Rea, but rather on behalf of Defendant Rea *and* remaining Defendant Santé Health Systems, Inc. ("Defendant Santé"). The Court notes

Defendant Rea's admission of a calculation error in the amount of $6.02, reducing the total amount of costs sought to $5,706.67.

Defendant Rea's memorandum of costs fails to show any one cost item was incurred solely on behalf of Defendant Rea; all appear to have been for the benefit of Defendants Rea, Nephew (prior to Nephew's dismissal), and Santé. Defendant Rea simply divides up the costs to seek his pro rata share. As articulated in *Nelson*, supra, 72 Cal.App. 4th at p. 130, such an across-the-board division of costs, without distinguishing between costs incurred on behalf of a particular party, is improper. Plaintiff's allegations are directed mainly at Defendant Santé, such that the amount of defense costs incurred thus far appear to only minimally be attributable to Defendant Rea, and Defendant Rea's showing as to those attributable to him is lacking in specificity.

Defendant's argument that Plaintiff waived any objections to apportionment is insufficiently supported. Moreover, Defendant Rea fails to show the messenger services used were reasonably necessary, rather than used simply for the sake of convenience. Defendant Rea states in his opposition that the ESI hosting and processing fees were "paid for the benefit of Rea specifically" (Opp., 7:1) but provides no support for this allegation, and none is clear to this Court under the circumstances of the instant case. Defendant Rea seeks one-half of the costs for deposing Community Medical Providers, Kathy Reyburn, Kathy Ashlin, and Walgreens, but makes no effort to show that one-half of the deposition testimony related to the allegations against Defendant Rea himself. Defendant Rea also seeks a pro-rata share of the Courtcall appearance fees, but again makes no showing that a pro-rata amount of the appearance was on Defendant Rea's behalf alone.

The Court finds the $435 first appearance filing fee was specific to Defendant Rea, and reasonably necessary to the litigation, as well as one-fourth of the filing fee for the motion for summary judgment, representing the portion attributable to Defendant Rea individually. Accordingly, Plaintiff's motion to tax costs is denied as to Defendant Rea's first appearance filing fee and one-fourth of the filing fee for the motion for summary judgment, and granted as to all remaining costs.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 08/02/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Malik Nasir Baz, a Trustee of the Baz Family Trust under Trust Agreement dated December 8, 2005 v. H. Ronald Sawl, individually and dba Sawl & Netzer***

Superior Court Case No. 14 CECG 00949

Hearing Date: August 4, 2016 **(Dept. 502)**

Motion: By Defendant seeking attorney's fees

Tentative Ruling:

To award $34,544.25 in attorney's fees to the Defendant as the prevailing party "on the contract."

Explanation:

Contracts providing for "reasonable" expenses and attorney fees rely on the court to determine the amount. [Civ.C. § 1717—reasonable attorney fees "shall be fixed by the court"; *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094-1095; *EnPalm, LLC v. Teitler Family Trust* (2008) 162 Cal.App.4th 770, 774; see *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698, 700-702—trial judge is in best position to value services rendered by counsel in courtroom]

First, all objections will be overruled. Second, there are some charges that appear unreasonable; i.e., $126 billed for an unrelated unlawful detainer action; two different attorneys billed for preparing the Answer; and $315 billed for a CMC that did not take place on the date claimed. As a result, the amount awarded will be reduced to $34,544.25**.**

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 08/03/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 503

03

Tentative Ruling

Re: ***Webb v. Tavassoli***
Case No. 15 CE CG 00179

Hearing Date: August 4th, 2016 (Dept. 503)

Motion: Defendants Athenix Physicians Group, Inc. and Athenix Body Sculpting Institute's Motion for Summary Judgment

Tentative Ruling:

To deny defendants' motion for summary judgment. (Code Civ. Proc. § 437c.)

NOTE: If oral argument is requested, it will be heard Thursday, August 11, 2016, at 3:30pm In Department 503.

Explanation:

" 'The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman.' [Citations.]" (*Landeros v. Flood* (1976) 17 Cal.3d 399, 410.)

When a defendant in a professional negligence case moves for summary judgment and supports its motion with competent expert testimony showing that its conduct fell within the standard of care, or the conduct did not cause injury to the plaintiff, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert testimony. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123.)

Here, defendants have presented the declaration of their expert on infection prevention, control and health epidemiology, Harriett Pitt, R.N, M.S.[2] She opines that, based on her review of the plaintiff's medical records, defendants did not breach the standard of care or cause plaintiff's injuries. Nurse Pitt states that there is nothing in

[2] Plaintiffs object that Nurse Pitt is not qualified to render opinions on the issues of breach of the standard of care and causation because she is not a medical doctor, and therefore the court should disregard her declaration. However, Nurse Pitt's declaration indicates that she has extensive experience in the field of infection prevention and control. (Pitt decl., ¶¶ 4-8.) Therefore, the court intends to find that she is qualified to be an expert on the issues raised in the motion, and thus it will overrule plaintiffs' objections regarding her qualifications.

plaintiff's medical records that indicates that any of the nurses or non-physician staff at Athenix violated the applicable standard of care. (*Id*. at ¶ 13.)[3] Athenix's policies and procedures are appropriate and within the standard of care. (*Id*. at ¶ 14.) Athenix had sign-off sheets reflecting that the staff was familiar with Athenix's policies and procedures regarding infection control. (*Id*. at ¶ 15.) The documentation also indicates that the temperature and humidity used in the autoclave sterilization machine was within the proper range. (*Id*. at ¶ 16.) The documents also indicate that Athenix properly used and monitored biologics in the sterilization process. (*Id*. at ¶ 17.) The documents also show that Athenix's equipment and instruments, including the autoclave sterilization machine, were properly maintained, and Athenix's accreditation was in order at the time of plaintiff's procedure. (*Id*. at ¶ 18.)

Thus, it is Nurse Pitt's opinion that there was no breach in the sterilization process, and Athenix's handling of the sterilization equipment was appropriate and within the standard of care. (*Ibid*.) The documents indicate that there were no instances or breaks in sterility during the procedure, wound care, and nursing care provided before and during the procedure. (Id. at ¶ 19.) Thus, Nurse Pitt opines that the nursing care provided during the operative visit was appropriate and within the standard of care, and nothing the staff did caused or contributed to plaintiff's infection. (*Ibid*.) Furthermore, sterile technique was used during the procedures. (*Id*. at ¶ 20.) The aftercare provided to plaintiff was appropriate and within the standard of nursing care, and there was nothing to indicate a breach of the standard of care. (*Id*. at ¶ 21.) The staff at Athenix was not a substantial factor in causing injury to her. (*Ibid*.) As a result, Nurse Pitt states that Athenix met the standard of care in providing care and treatment to plaintiff. (*Id*. at ¶ 22.)

Consequently, defendants have provided sufficient evidence to meet their burden of showing that they did not breach the standard of care with regard to the surgery and post-surgical care for plaintiff. Defendants' evidence also meets their burden of showing that they did not cause plaintiff's injuries. Consequently, the burden shifts to plaintiff to provide her own expert declaration that raises triable issues of material fact as to whether defendants breached the standard of care and caused her injuries.

In their opposition, plaintiffs have provided the declaration of their own expert, Dr. Toby Paulson, D.O. Dr. Paulson notes that it is imperative that surgical facilities have infection control policies in place and that they train and supervise all employees to ensure each and every infection control policy is completely followed. (Paulson decl., ¶ 14.) Paulson notes that Athenix had a policy regarding monitoring of "nosocomial

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[3] Plaintiffs object to paragraphs 16-22 of Pitt's declaration, contending that her opinions are not supported by the maintenance records for the autoclave machine, since there are only maintenance records for the years 2011, 2012 and 2014, and not for December 9th, 2013, when plaintiff had her surgery. However, the medical records do indicate that the autoclave machine was tested and passed inspection on the date of the surgery. (Exhibit H to defendants' evidence, Operating Room Weekly Log for 12/9/13.) Therefore, the court intends to overrule the objections and find that Nurse Pitt's declaration is supported by adequate records showing that the autoclave was tested and passed inspection at the time of the surgery.

infections" (i.e. infections introduced during surgery) that required a monthly letter to be sent to patients with a self-addressed, stamped envelope, date of surgery, name of the patient, procedure done, and a question about whether an infection had occurred. (*Id*. at ¶ 17.) This procedure allowed Athenix to track the number of procedures performed, number of infections reported, infection rate per month, and other pertinent information. (*Ibid*.) However, Regina Jones, the defendants' person most knowledgeable regarding the causes of the post-operative infection of plaintiff, could not even answer whether Athenix had a policy regarding infection control for surgeries. She also seemed to be unaware of whether plaintiff had even had a surgical site infection. (*Id*. at ¶ 18.)[4] According to Dr. Paulson, this testimony shows that Athenix chose to violate its own infection control policies and was a clear violation of the standard of care. (*Ibid*.) Also, plaintiff herself denied that she ever received a letter from Athenix asking her to report whether she had a surgical site infection, even though she had in fact had a life-threatening infection that required her to be hospitalized. (*Id*. at ¶ 19; see also Webb decl., ¶ 3.)

However, Dr. Paulson's declaration fails to raise a triable issue of material fact with regard to whether Athenix caused plaintiff's injuries by failing to send a letter to plaintiff asking about her infection. While Paulson opines that it was a breach of the standard of care to fail to send the letter, plaintiff has not shown how the failure to send an inquiry letter after the surgery in any way caused or contributed to the her injuries. Indeed, since that the letter would not have been sent until after the surgery and after plaintiff was hospitalized with the infection, there could not have been any causal connection between failing to send the letter and the infection. At most, the letter would have helped Athenix to prevent future post-surgical infections. However, it would not have prevented the plaintiff's infection, which had already occurred. Thus, even assuming that the failure to send the letter was a breach of the standard of care, it did not cause plaintiff's infection and thus it does not provide a basis for plaintiff's negligence claim.

Dr. Paulson also states that plaintiff developed a life-threatening infection from Enterobacter cloacae and E. coli after the surgery, and that Enterobacter surgical site infections are recognized as nosocomial infections, i.e. the bacteria was introduced into the wound during surgery. (Paulson decl., ¶ 21.) He claims that, in all medical probability, the Enterobacter was introduced into plaintiff's surgical wound during the surgery on December 9th, 2013. (*Id*. at ¶ 22.) Thus, there was more likely than not a breach in Athenix's infection control system that resulted in the Enterobacter being introduced into her surgical wound, causing the life-threatening surgical site infection. (*Id*. at ¶ 25.) More likely than not, the breach was caused by Athenix choosing to violate

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[4] Dr. Paulson misrepresents Nurse Jones's testimony at her deposition. In the portions of the deposition transcript presented by plaintiff, Jones never indicated that she was unaware of Athenix's infection control policies, or that she was not aware of plaintiff's infection. In fact, she testified that she was familiar with Athenix's infection control procedures. (Jones Depo., p. 28:18-21.) She also stated that she "was not aware of when [plaintiff] was admitted to the hospital." (*Id*. at p. 42:1-6.) However, she did not state that she was unaware of her infection. Therefore, to the extent that Dr. Paulson states that Athenix breached the standard of care because it was not following proper infection control and tracking procedures, this opinion is not supported by the documentary evidence.

its own infection control policies and thereby violating the standard of care. (*Id*. at ¶ 26.)

However, Dr. Paulson's opinions regarding the nature and origin of the plaintiff's infection are not supported by the medical records and other evidence submitted in the moving and opposing papers. Dr. Paulson states that he has based his opinions on plaintiff's medical records, attached as Exhibit A to defendants' motion, the deposition transcript of Regina Jones, the declaration of plaintiff, the declaration of Harriett Pitt, and the moving party's exhibits attached thereto. (Paulson decl., ¶ 7.) Yet none of these materials discuss the plaintiff having an Enterobacter or E. coli infection. In fact, there are no documents from the hospital where plaintiff was treated after she became ill, nor are there any lab reports or other documents indicating the nature of her infection. The only medical records are from Athenix, and these do not discuss the exact nature of the infection. (Tab 3, Exhibit A to Defendant's Motion.) Dr. Paulson may also have relied on some other records, such as the records from the hospital that treated plaintiff, but those records are not attached to the opposition or referenced in Paulson's declaration.

Thus, there is no documentary support for Paulson's conclusion that plaintiff contracted an Enterobacter infection, or that the infection must have been caused by a break in sterility during the surgical procedure. An expert's opinion is only as good as the facts and records on which it relies. (*Kelly v. Trunk* (1998) 66 Cal.App.4th 519, 524.) If it appears that the expert's declaration is unsupported by the evidence, the court may reject the expert's conclusions. (*Ibid*.) Here, there are no declarations, depositions, or medical records that support Dr. Paulson's conclusion that the plaintiff's infection was caused by a break in the sterility procedures at Athenix, or that the infection was introduced during surgery. Therefore, the court intends to disregard Dr. Paulson's statements that the infection was caused by a failure of Athenix staff to observe sterility procedures during the surgery, as his conclusions are unsupported by any evidence in the record.

On the other hand, Dr. Paulson has also stated that Athenix breached the standard of care and caused injury to plaintiff when it failed to take her vital signs, including her temperature, during her post-operative visits. (Paulson decl., ¶¶ 27-28, 33-36, 38.) Paulson claims that the standard of care required Athenix to take plaintiff's temperature during her post-operative visits in order to detect and treat an infection as soon as possible. (*Ibid*.) However, Athenix failed to take plaintiff's vital signs or take her temperature during any of her three post-operative visits. (*Id*. at ¶¶ 28, 33.) As a result, the infection was not detected until 12 days after the surgery, at which point the plaintiff had developed a large abscess and necrotizing fasciitis. (*Id*. at ¶ 34.) More likely than not, if a temperature had been taken it would have shown an abnormal temperature at each post-operative visit. (*Id*. at ¶ 35.) Recognition of the abnormal temperature would have led to a prompt early diagnosis and medical intervention to prevent the abscess and necrotizing fasciitis. (*Id*. at ¶ 36.) More likely than not, the failure to take plaintiff's temperature was a substantial factor in causing her injuries. (*Id*. at ¶ 38.)

However, the medical records attached to the moving papers do not clearly state whether or not plaintiff's vital signs, including her temperature, were taken during

her post-operative visits. The doctor's notes for the post-operative visits indicate that plaintiff was "afebrile" (i.e., not feverish) during the visits on December 13th and December 19th. 2013. She was also "overall doing very well" with well-controlled pain during her visit on December 10th, 2013. According to the doctor's notes from January 7th, 2014, plaintiff was "doing quite well – afebrile without signs of infection" during her December 19th, 2013 visit, and even asked about going Christmas shopping. However, the following day she called and complained of having a fever of 101 degrees. The doctor prescribed antibiotics and told her that, if the fever persists or there is any sign of infection, she would require evaluation by a hospital or urgent care. The following day her temperature was 99.5 degrees and she was having some drainage, at which time the doctor sent her to the Fresno Community Clovis ER.

Thus, the doctor's notes are somewhat ambiguous as to whether or not plaintiff's temperature was checked during her post-operative visits at Athenix. The notes indicate that plaintiff as "afebrile", which could mean that he took her temperature and she did not have a fever, or that he did not take her temperature but she did not seem to be feverish. The only references to a specific temperature are the descriptions of plaintiff's phone calls on December 20th and 21st, and she apparently took her own temperature on these occasions.

However, since there are no specific references to taking temperatures or vital signs in the other post-operative notes, there does appear to be some support for Dr. Paulson's conclusion that plaintiff's temperature was not taken. If her temperature was not taken, this was a breach of the standard of care and could have led to a delay in treating the post-operative infection and more serious injuries to plaintiff as a result. (Paulson decl., ¶¶ 33-36.) Therefore, plaintiff has raised a triable issue of material fact as to whether defendants breached the standard of care and caused or contributed to her injuries. As a result, the court intends to deny the motion for summary judgment as to plaintiff's complaint.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 08/01/16 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Phillips v. The Bank of New York Mellon, et al.***

Case No. 16CECG00929

Hearing Date: August 4, 2016 (Dept. 503)

Motion: By Defendants The Bank of New York Mellon (f/k/a The Bank of New York), Ditech Financial LLC and Mortgage Electronic Registration Systems, Inc. demurring to the First Amended Complaint brought by Plaintiff Ernest Phillips

Tentative Ruling:

NOTE- If oral argument is requested, it will occur on August 11th, 2016, at 3:30 p.m. in Department 503.

The demurrers to the Second, Third, Fourth, Fifth, and Seventh Causes of Action are sustained with leave to amend.

The demurrer to the Sixth Cause of Action is sustained without leave to amend; it is barred by the terms of 18 USC §1635, subdivision (f).

On the Court's own motion, the Court will order the First Cause of Action stricken. Plaintiff may seek leave to amend his complaint should a foreclosure occur on otherwise applicable facts.

Plaintiff shall have ten (10) court days in which to file a Second Amended Complaint. All new or amended allegations shall be set forth in **boldface** typeset.

Explanation:

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead "ultimate facts." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

A demurrer challenges defects that appear on the face of the complaint or are judicially noticeable. (Code Civ.Proc. §430.30, subd.(a).)

Defendants demur to every single cause of action alleged by Plaintiff.

1) *First Cause of Action: Wrongful Foreclosure*

The basic elements of a tort cause of action for wrongful foreclosure are largely the same as that for an equitable cause of action to set aside a foreclosure sale. (*Miles v. Deutsche Bank Nat'l Trust Co.* (2015) 236 Cal.App.4th 394, 408.) The elements are: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering."

As stated by the Defendants, nowhere in the First Amended Complaint has Plaintiff alleged any actual foreclosure. While Plaintiff indicates that there has been a "Notice of Default and Election to Sell Under Deed of Trust" on the part of certain Defendants, Plaintiff did not indicate where in the First Amended Complaint such allegations occur and, moreover, an election to sell is not the same as a sale of real property. For this reason alone, the demurrer would be sustained.

Even if the Plaintiff had alleged a sale of property, Defendants contend that Plaintiff has not alleged an "illegal, fraudulent, or willfully oppressive sale." In response, Plaintiff appears to rely on *Yvanova v. New Century Mortgage* (2014) 62 Cal.4th 919 for the proposition that he can pursue his claims. However, the *Yvanova*'s holding was a self-professed "narrow" one: "We hold only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment." (*Id.* at 924.)

Therefore, Plaintiff has to allege that the assignments were void in order to have standing. Specifically, Plaintiff contends that the assignments are void because transfers occurred after the trust's closing date and are thus void under New York law. (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 97.) However, as Defendants point out, *Yvanova* is concerned only with the standing to pursue post-foreclosure remedies. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815). Likewise, *Glaski* dealt with issues arising after a foreclosure. (*Glaski, supra,* 218 Cal.App.4th at 1086.) Although it does appear that the Supreme Court remanded several cases involving pre-foreclosure remedies for reconsideration in light of *Yvanova*, it is plainly insufficient to derive any legally binding authority on that basis.

For all these reasons First Cause of Action is not ripe. Therefore, the Court, on its own motion, will strike the First Cause of Action. Plaintiff may move to amend to allege this cause of action for wrongful foreclosure on applicable facts, once a foreclosure has occurred.

2) *Second Cause of Action: Violation of Civil Code §2924, subd.(a)(6).*

Although Defendants failed to brief this cause of action in their points and authorities, Plaintiff did address the issue in his opposition and Defendants in their reply.

Section 2924, subdivision (a)(6) states:

> No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.

Plaintiff alleges that neither The Bank of New York Mellon nor Ditech are the holder in beneficial interest under the mortgage or deed of trust. (FAC ¶¶97-100.) However, as Defendants point out, Exhibit A to the FAC includes an assignment from MERS, on behalf of "America's Wholesale Lender," to the Bank of New York Mellon. (FAC, Exh. A.) Therefore, because exhibits attached to a complaint are given precedence over allegations, there does not appear to be a valid cause of action. (*Del W. Webb Corp. v. Structural Materials Co*. (1981) 123 Cal.App.3d 593, 604.)

Likewise, to the extent that this cause of action can be interpreted to challenge a party's standing to foreclose, it is well-settled that such a pre-foreclosure action is not tenable. (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 512 (disapproved of on other grounds by *Yvanova, supra,* 62 Cal.4th at 934-35.))

Therefore, the demurrer to the Second Cause of Action is sustained with leave to amend.

3) Third Cause of Action: Breach of Covenant of Good Faith and Fair Dealing

Plaintiff alleges a breach of the covenant of good faith and fair dealing by "denying Plaintiff the benefits of the loan contract which set the Plaintiff up for certain default and by attempting to collect on the Plaintiff's Loan without any lawful standing or authority to do so." (FAC ¶105.)

However, Plaintiff does not allege the terms or attach any written contract between Plaintiff and any other party. (*Carma Developers (Cal.) Inv. v. Marathon Dev. California, Inc.* (1992) 2 Cal.4th 342, 373 ("the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of their agreement.") Absent the contract, the Court cannot tell what the proper contours of this cause of action should be.

Defendants also note that Plaintiff has not alleged anything beyond a very perfunctory allegation of damages as a result of the breach of the covenant. (FAC ¶107.) Since damages are a requirement for a contract claim, *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1332, this is an additional reason for the demurrer to be sustained as to this cause of action with leave to amend.

4) Fifth Cause of Action: Equitable Estoppel

Plaintiff alleges that Defendants are attempting to foreclose on a contract they know to be void and unenforceable. (FAC ¶115-116.)

The four elements to be proven to establish equitable estoppel are (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury." (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 756.) Here, Plaintiff has not alleged these elements, including that Plaintiff has somehow relied on some conduct to his injury.

Defendants argue that "equitable estoppel" is not a cause of action; however, the case cited for that proposition does not so hold. (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261-62 (holding that the doctrine applies to public entities).)

In any event, the demurrer to the Fifth Cause of Action is sustained with leave to amend.

5) Sixth Cause of Action: Rescission under TILA and Reg. Z per 15 U.S.C. §1635

According to the Plaintiff, he has a right to rescission under 15 USC §1635. Section 1635, subdivision(a) states, in pertinent part: "in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so."

Plaintiff alleges that he was never given "accurate material disclosures" and is therefore entitled to rescind and provided notice of the rescission on January 10, 2016. (FAC ¶¶117-129.)

The borrower's right to rescission is extended from three days to three years if the lender "(1) fails to provide notice of the borrower's right of rescission or (2) fails to make a material disclosure." (*Kelley v. Mortgage Elec. Reg. Sys., Inc.* (N.D. Cal.2009) 642 F.Supp.2d 1048, 1059.)

However, the three year limitation appears to not be subject to any other tolling and is an absolute bar. (*McOmie-Gray v. Bank of America Home Loans* (9th Cir. 2012) 667 F.3d 1325, 1329.)

Plaintiff's argument that he only learned of his rights when he found out about the United States' Supreme Court's ruling in *Jesinoski v. Countrywide Home Loans, Inc.* (2015) 135 S.Ct. 790, is simply unavailing.

Therefore, the Demurrer to the Sixth Cause of Action is sustained without leave to amend.

6) *Fourth Cause of Action: Declaratory Relief*
Seventh Cause of Action: Bus.&Prof. Code §§17200 & 17500

Plaintiff has filed a request for Declaratory Relief and one for violation of Business and Professions Code §17200 and §17500. Both of these causes of action are based on the other violations, and, because the demurer to each of the prior causes of action has been sustained, the demurrer to the Fourth and Seventh Causes of Action are also sustained. (*Pittenger v. Home Sav. & Loan Ass'n of Los Angeles* (1958) 166 Cal.App.2d 32, 36 (declaratory relief action dismissed where no other justiciable controversy exists); *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180 (17200 "borrows" violations of other laws).)

Furthermore, as Defendants note, Plaintiff has not alleged sufficient standing to pursue his 17200/17500 claims. In order to maintain the cause of action, a plaintiff must have "suffered injury in fact and has lost money or property as a result of [the] unfair competition." (Bus.&Prof. §17204.) In the opposition, Plaintiff claims that he has suffered injury in the sense of "ruination of credit and the defense of his property." (Opposition at p. 13.) However, such allegations do not appear in the First Amended Complaint.

As a result, the demurrer is sustained with leave to amend.

Days before the hearing, Defendants submitted *Yhudai v. Impac Funding Corp.* (July 29, 2016) B262509. Given that the case applies to a post-foreclosure challenge and because Plaintiff has not had the chance to brief the applicability of the ruling to this case, the Court will not consider

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 08/01/16 .
(Judge's initials) (Date)